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JOHN F. DAVIS, CL

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968-1969

No. ~~243~~ 23

CALVIN TURNER, et al.,

Appellants,

—v.—

W. W. FOUCHER, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT FILED DECEMBER 14, 1968
PROBABLE JURISDICTION NOTED FEBRUARY 24, 1969

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| Interrogatories to Defendants Moore, et al. | December 21, 1967 |
| Answers of Defendants Moore, et al., to Interrogatories | January 10, 1968 |
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| Defendants Exhibit I, II and III | February 23, 1968 |
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| Order on Pending Motions | June 5, 1968 |
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| Opinion and Order of Three-Judge Court | August 5, 1968 |
| Final Judgment | September 19, 1968 |
| Notice of Appeal Filed | October 14, 1968 |
| A Transcript of Proceedings on February 23, 1968 filed | November 18, 1968 |

Complaint

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION
Civil Action No. 1357

CALVIN TURNER, and SANDRA JUANITA TURNER, a minor by
Calvin Turner, her father and next friend, and all
others similarly situated,

Plaintiffs,

—v.—

W. W. FOUCHE, RASTUS DURHAM, and ELMO BACON, Individually, and as representatives of the class of persons known as Grand Jurors of Taliaferro County, Georgia; CRANSTON JONES, W. A. DRINKARD, CARL CHAPMAN, H. E. WILLIAMS, JR., and MRS. WILLIE MAE FAMBROUGH, Individually, and as Members of the Board of Education of Taliaferro County, Georgia; E. C. MOORE, GUY BEAZLEY, J. M. TAYLOR, L. T. LUNCEFORD, and CLARENCE GRIFFITH, Individually, and as Jury Commissioners of Taliaferro County, Georgia,

Defendants.

I.

PARTIES

A. *Plaintiffs*

1. Plaintiff, Calvin Turner, is a Negro citizen of the State of Georgia and a citizen of the United States, re-

siding in Taliaferro County, Georgia. He is a registered voter and the father of children attending the schools of Taliaferro County, Georgia. He sues on behalf of himself and his children as well as all Negro residents of Taliaferro County, Georgia, similarly situated, which class is too numerous to bring before this Court.

2. Sandra Juanita Turner, is a Negro citizen of the State of Georgia and a citizen of the United States, residing in Taliaferro County, Georgia. She attends a school that is part of the County School System of Taliaferro County, Georgia. She sues on behalf of herself and all Negro school children of Taliaferro County, Georgia, similarly situated, which class is too numerous to bring before this Court.

B. Defendants

3. Defendants, W. W. Fouche, Rastus Durham, and Elmo Bacon, are white citizens of the State of Georgia and of the United States, residing in Taliaferro County, Georgia. They are registered voters and Members of the Grand and Traverse Juries of Taliaferro County, Georgia. They are sued individually, and in their capacities as Grand Jurors of Taliaferro County, Georgia.

4. Defendants, Cranston Jones, W. A. Drinkard, H. E. Williams, Jr., Carl Chapman, and Mrs. Willie Mae Fambrough, are white citizens of the State of Georgia and of the United States, residing in Taliaferro County, Georgia. They are all Members of the Board of Education of Taliaferro County, Georgia, chosen for the positions by the Grand Jury of said county. They are sued individually, and in their capacities as Members of the Board of Education of Taliaferro County, Georgia.

5. Defendants, E. C. Moore, Guy F. Beazley, J. M. Taylor, L. T. Lunceford, and Clarence Griffith, are white citizens of the State of Georgia and of the United States, residing in Taliaferro County, Georgia. They are all Jury Commissioners for said county, chosen by the Honorable Robert L. Stephens, a white citizen of the State of Georgia and of the United States, residing in McDuffie County, Georgia, Superior Court Judge for the Toombs Judicial Circuit. They are sued individually, and in their capacities as Jury Commissioners for Taliaferro County, Georgia.

II.

JURISDICTION

6. The jurisdiction of this Court over the complaint arises under Title 28, United States Code, Sections 1331 (a), 1343(3) and (4), 2201, 2202, 2281, and 2284; Title 42, United States Code, Sections 1981, 1983, 1988, 1994, 2000d, and 2000e; and the Constitution of the United States, and more particularly, the Fifth, Ninth, Thirteenth, Fourteenth, and Fifteenth Amendments thereto.

7. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of Ten Thousand (\$10,000.00) Dollars.

III.

CAUSE OF ACTION

8. The defendants herein, under color of certain laws of the State of Georgia, have purposefully pursued a custom, practice, or usage, jointly and severally, and with

other persons to the plaintiffs unknown, to subject or cause to be subjected the plaintiffs, citizens of the United States, to the deprivation of rights, privileges and immunities, secured to them by the Constitution and laws of the United States.

9. Pursuant to this custom, practice, and usage, the defendants, for the purpose of depriving, either directly or indirectly, the plaintiffs and the members of the class which they represent of equal educational opportunities, have chosen and continue to choose, solely on the basis of race, all-white members on the Board of Education of Taliaferro County, Georgia.

10. Plaintiffs and other Negro citizens have made every effort to communicate their dissatisfaction with the schools of Taliaferro County to the defendants, but to no avail. The schools of Taliaferro County are integrated in name only: those who attend the county schools of Taliaferro County, Georgia, are all-Negro; all the white students presently residing in Taliaferro County, Georgia, attend either a private school set up expressly for the purpose of avoiding the integration compelled by the Constitution and laws of the United States, or schools outside the county. Among those white children attending said private school or schools outside the county are children of the named defendants.

11. Defendants have chosen and threaten to continue to choose an all-white school board to superintend the all-black public schools of Taliaferro County, Georgia pursuant to a number of State Constitutional statutes or provisions:

(a) Article VIII, Section V, paragraph I, of the Constitution of the State of Georgia of 1945 (2 Ga. Code Ann., Sec. 6801), which provides that:

"2-6801. Paragraph I. *Establishment and maintenance; board of education; election, term, etc.*—Authority is granted to counties to establish and maintain public schools within their limits. Each county, exclusive of any independent school system now in existence in a county, shall compose one school district and shall be confined to the control and management of a County Board of Education. The Grand Jury of each county shall select from the citizens of their respective counties five freeholders, who shall constitute the County Board of Education. Said members shall be elected for the term of five years except that the first election of Board members under this Constitution shall be for such term that will provide for the expiration of the term of one member of the County Board of Education each year. In case of a vacancy on said Board by death, resignation of a member, or from any other cause other than the expiration of such member's term of office, the Board shall by secret ballot elect his successor, who shall hold office until the next Grand Jury convenes at which time the said Grand Jury shall appoint the successor member of the Board for the unexpired term. The members of the County Board of Education of such county shall be selected from that portion of the county not embraced within the territory of an independent school district.

The General Assembly shall have authority to make provision for local trustees of each school in a county system and confer authority upon them to make

recommendations as to budgets and employment of teachers and other authorized employees."

Said constitutional provision of the State of Georgia is unconstitutional under the Equal Protection and Due Process of Law Clauses of the Fourteenth Amendment of the Constitution of the United States, and the Thirteenth Amendment thereto, on its face and as applied by reason of the systematic and long continued exclusion of Negroes and non-freeholders as members of the Board of Education, and the total exclusion or limited inclusion of members of the Negro race on the selecting grand juries.

(b) Sections 902, 902.1, 903, and 905, 32 Georgia Code Annotated, which provide that:

"32-902. *Membership in County boards.*—The grand jury of each county (except those counties which are under a local system) shall, from time to time, select from the citizens of their respective counties five freeholders, who shall constitute the county board of education. Said members shall be elected for the term of four years, and shall hold their offices until their successors are elected and qualified. Provided, however, that no publisher of schoolbooks, nor any agent for such publisher, nor any person who shall be pecuniarily interested in the sale of schoolbooks, shall be eligible for election as members of any board of education or as county superintendent of schools: Provided, further, that whenever there is in a portion of any county a local school system having a board of education of its own, and receiving its pro rata of the public school fund directly from the State Superintendent of Schools, and having no dealings what-

ever with the county board of education, then the members of the county board of education of such county shall be selected from that portion of the county not embraced within the territory covered by such local system." (Acts 1919, p. 320.)

"32-902.1. *Selection of board members by grand jury.*—

The members of the county boards of education in those counties in which the grand jury selects such members pursuant to Article VIII, Section V., Paragraph I of the Constitution of Georgia of 1945, as amended (Sec. 2-6801), shall be selected by the last grand jury immediately preceding the expiration of the term of the member that the member to be selected will replace." (Acts 1953, Nov. Sess., p. 334.)

"32-903. *Qualifications of members.*—The grand jury

in selecting the members of the county board of education shall not select one of their own number then in session, nor shall they select any two of those selected from the same militia district or locality, nor shall they select any person who resides within the limits of a local school system operated independent of the county board of education, but shall apportion members of the board as far as practicable over the county; they shall elect men of good moral character, who shall have at least a fair knowledge of the elementary branches of an English education and be favorable to the common school system. Whenever a member of the board of education moves his residence into a militia district where another member of the board resides, or into a district or municipality that has an independent local school system, the member changing his residence shall immediately

cease to be on the board and the vacancy shall be filled as required by law. Notwithstanding the foregoing provisions to the contrary, a county may provide by local law that two or more members of the board of education may be selected from the same militia district." (Acts 1919, pp. 288, 321; 1965, p. 124.)

"32-905. *Certificate of election; removal; vacancies.*—

Whenever members of a county board are elected or appointed, it shall be the duty of the clerk of the superior court to forward to the State Superintendent of Schools a certified statement of the facts, under the seal of the court, as evidence upon which to issue commissions. This statement must give the names of the members of the board chosen and state whom they succeed, whether the offices were vacated by resignation, death or otherwise. The evidence of the election of a county superintendent of schools shall be the certified statement of the secretary of the meeting of the board at which the election was held. Any member of a county board of education shall be removable by the judge of the superior court of the county, on the address of two-thirds of the grand jury, for inefficiency, incapacity, general neglect of duty, or malfeasance or corruption in office, after opportunity to answer charges; the judges of the superior courts shall have the power to fill vacancies, by appointment, in the county board of education for the counties composing their respective judicial circuits, until the next session of the grand juries in and for said counties, when said vacancies shall be filled by said grand juries." (Acts 1919, p. 322.)

Each of said statutes is unconstitutional under the Equal Protection and Due Process of Law Clauses of the Fourteenth Amendment of the Constitution of the United States, and the Thirteenth Amendment thereto, on its face and as applied, by reason of the systematic and long continued exclusion of Negroes, the uncertainty, vagueness, and ambiguousness of the standards set forth therein, and by reason of the total exclusion of non-freeholders as Members of the Board of Education of Taliaferro County.

(c) Section 101, 59 Georgia Code Annotated, which provides that:

"59-101 (813 P. C.) *Jury commissioners; appointment; number; qualifications; terms; removal.*—There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor: Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners." (Acts 1878-9, p. 27; 1887, p. 52; 1901, p. 43; 1935, p. 151.)

Said statute is unconstitutional, under the Equal Protection and Due Process of Law Clauses of the Fourteenth Amendment of the Constitution of the United States, and the Thirteenth Amendment thereto, in that, the standards set forth therein for qualification and eligibility as a jury

commissioner are so vague, indefinite and uncertain and by reason of the total exclusion of members of the Negro race from service as jury commissioners in Taliaferro County.

(d) Section 106, 59 Georgia Code Annotated (Ga. Laws 1967, Vol. I, p. 251) which provides that:

"59-106. Immediately upon the passage of this Act and thereafter at least biennially, or, if the judge of the superior court shall direct, at least annually, on the first Monday in August, or within sixty (60) days thereafter, the board of jury commissioners shall compile and maintain and revise a jury list of upright and intelligent citizens of the county to serve as jurors. In composing such a list they shall select a fairly representative cross-section of the upright and intelligent citizens of the county from the official registered voters' list which was used in the last preceding general election. If at any time it appears to the jury commissioners that the jury list so composed, is not a fairly representative cross-section of the upright and intelligent citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including upright and intelligent citizens of any significantly identifiable group in the county which may not be fairly represented thereon.

After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse

jurors for the county, to be drawn for service as provided by law, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

Said statute is unconstitutional, under the Equal Protection and Due Process of Law Clauses of the Fourteenth Amendment of the Constitution of the United States, and the Thirteenth Amendment thereto, by reason of the uncertainty, indefiniteness, vagueness, of the standards set forth therein for service as grand and traverse jurors, and by reason of the token inclusion of members of the Negro race from grand and traverse jury service in Taliaferro County.

12. The jury commissioners of Taliaferro County, Georgia, who are empowered by law to choose the members of the grand and traverse juries of said county, are all white. There has never been, within recent memory, a Negro jury commissioner in Taliaferro County, Georgia. The jury commissioners are chosen by the Judge of the Superior Court of Taliaferro County, Georgia. Said judge, the Honorable Robert L. Stephens, is white.

13. There are 2,097 Negro residents in Taliaferro County, Georgia, of whom 979 are over the age of 21 years, including 435 males and 544 females.

14. There are 1,273 white persons resident in Taliaferro County, Georgia, of whom 877 are over the age of 21 years, including 395 males and 482 females.

15. There are 1,172 members of the Negro race enrolled as registered voters in Taliaferro County, Georgia, and hence eligible for service on the grand and traverse juries of said county.

16. There are 1,053 white persons enrolled as registered voters in Taliaferro County, Georgia, and hence eligible for service on the grand and traverse juries of said county.

17. White persons are grossly over-represented on the grand and traverse jury lists of Taliaferro County, Georgia, as chosen by the all-white jury commissioners, while Negroes are grossly under-represented.

18. Plaintiffs allege that as a result of defendants' conduct, they and the members of their class are unable to enjoy the full and equal benefit of public education in Taliaferro County, Georgia, free of discrimination or segregation because of their race or color. The policy, custom, practice, and usage of the defendant school board has been such as to deprive the plaintiffs and members of their class of textbooks, facilities, laboratories, recreation facilities, teaching programs, bus transportation, and a multiplicity of other advantages which should rightfully be theirs as the intended beneficiaries of laws of the United States providing for equal educational opportunities without regard to race or color or previous condition of servitude. The deprivation of such advantages means that the minor plaintiffs are ill-equipped to advance in the modern world, and must needs become peons in the hands of the white entrepreneurs of said county.

IV.

EQUITY

19. Unless this Court restrains the enforcement, operation, and execution of the aforesaid void, unconstitutional, and illegal state statutes, which statutes are void and illegal on their face and as applied herein, in that, they violate the Constitution of the United States, and in particular, the Fifth, Ninth, Thirteenth, Fourteenth, and Fifteenth Amendments thereto. These statutes violate the fundamental guarantees of due process of law in that they are vague and indefinite, and as such lead to the denial of equal protection and due process to all persons of all races and sexes. Moreover, said statutes and constitutional provisions impress plaintiffs and the class which they represent with badges of slavery and the indica of the previous condition of servitude of their ancestors.

20. Plaintiffs have no adequate remedy at law. Plaintiffs pray that they, for themselves, and for members of the class which they represent be awarded ancillary money damages in the amount of \$500,000.00 to compensate them for past deprivations and denials of their federal constitutional and statutory rights, privileges, and immunities by the defendants or some of them.

WHEREFORE, plaintiffs pray for the following relief:

(1) That pursuant to Title 28, United States Code, Sections 2281 and 2284, a three-judge federal district court be immediately convened to hear and determine this proceeding;

(2) That a preliminary and permanent injunction issue restraining the defendants, their agents, attorneys, and successors in office, from the enforcement, operation, or execution of Sections 2-6801, 32-902, 32-902.1, 32-903, 32-905, 59-101 and 59-106, Code of Georgia Annotated;

(3) That a declaratory judgment issue declaring and adjudging Sections 2-6801, 32-902, 32-902.1, 32-903, 32-905, 59-101, and 59-106, of Georgia Code Annotated void on their face, null and void as violative of the Constitution of the United States, and/or as applied by the defendants herein;

(4) That the memberships of the County Board of Education of Taliaferro County, Georgia, be declared vacant;

(5) That a receiver be appointed to operate the Taliaferro County, Georgia, County School System pending the selection of new county school board officials on a constitutionally acceptable basis;

(6) That the present membership of the Grand and Traverse Jury Lists of Taliaferro County, Georgia, be declared vacant and void;

(7) That the positions of jury commissioners for Taliaferro County, Georgia, be declared vacant, null and void;

(8) That this Court appoint a special master to appoint members for the grand and traverse juries of Taliaferro County, Georgia;

(9) That ancillary damages be awarded in the sum of \$500,000.00;

(10) That this Court grant and all other relief which it may deem meet and proper.

Order Appointing Three-Judge Court

The Honorable Frank M. Scarlett, District Judge, United States District Court for the Southern District of Georgia, to whom an application for injunction and other relief has been presented in the above styled and numbered cause, having notified me that the action is one required by act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Honorable Griffin B. Bell, United States Circuit Judge, and the Honorable Lewis R. Morgan, United States District Judge for the Northern District of Georgia, to serve with Judge Scarlett as members of, and with him to constitute the said Court to hear and determine the action.

WITNESS my hand this 22nd day of November, 1967.

JOHN R. BROWN
Chief Judge, Fifth Circuit

Motion to Dissolve Three-Judge Court

The defendants move the Court as follows:

To dissolve the Three-Judge Court, convened in this case by order of Chief Judge John R. Brown, and remand the case for determination on all proper issues which may be made for that:

(a) No substantial question of the constitutionality *vel non* of any state statute appears from the face of the pleadings, the mere allegation that certain statutes are unconstitutional under certain clauses of certain amendments to the Constitution being insufficient;

(b) No substantial question of the constitutionality of the Georgia statutes quoted in the complaint is raised in that the complainants do not seek to forestall the demands of any general state policy, the validity of which they challenge;

(c) A Three-Judge Court is not required or authorized in a case where the complaint is that the statutes are unconstitutional as applied.

**Request for Admission of Facts by the Defendants
W. W. Fouche, et al.**

The plaintiffs request that the defendants, W. W. Fouche, et al., within ten days after service of this request to admit, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. The jury commissioners of Taliaferro County, Georgia, are all members of the so-called white or Caucasian race.

2. The jury commissioners of Taliaferro County, Georgia, have been members of the so-called white or Caucasian race for at least fifty (50) years.

3. Within recent memory, there have been no Negro jury commissioners of Taliaferro County, Georgia.

4. The members of the Board of Education of Taliaferro County, Georgia, are members of the so-called white or Caucasian race.

5. Within recent memory, and for at least fifty (50) years, the members of the Board of Education of Taliaferro County, Georgia, have been members of the so-called white or Caucasian race.

6. There have never been, within recent memory, any Negro members of the Board of Education of Taliaferro County, Georgia.

7. No children of any members of the present board of education of Taliaferro County, Georgia, attend the public schools of Taliaferro County, Georgia.

8. No children of the so-called white or Caucasian race attend the public schools of Taliaferro County, Georgia.

9. The jury lists for the grand and traverse juries of Taliaferro County, Georgia, contain no more than thirty percent (30%) members who are Negroes.

10. The jury lists contain no more than twenty-five (25%) percent members who are females.

11. There are no teachers in the public schools of Taliaferro County, Georgia, who are members of the so-called white or Caucasian race.

12. There are no free school buses provided for children who attend the public schools of Taliaferro County, Georgia.

13. The members of the school administration of Taliaferro County, Georgia, are all members of the so-called white or Caucasian race.

14. The expenditure of funds per pupil in Taliaferro County, Georgia, is less today than it was when there were members of the so-called white or Caucasian race attending the public schools of Taliaferro County, Georgia.

15. The number of teachers in the public schools of Taliaferro County, Georgia, who are members of the so-called white or Caucasian race is less than it was when children of the so-called white or Caucasian race were attending the public schools of Taliaferro County, Georgia.

16. The average level of higher education attained by the teachers in the public schools of Taliaferro County,

Georgia, is less today than it was during that period when said public schools were attended by pupils of the so-called white or Caucasian race.

17. The number of library books per pupil in the public schools of Taliaferro County, Georgia, is less today than it was when members of the so-called white or Caucasian race were pupils in the said public school system.

18. The average number of pupil per classroom is greater today in the public schools of Taliaferro County, Georgia, than it was when members of the so-called white or Caucasian race were attending the said public school system.

19. The number of pupils per teacher in the public schools of Taliaferro County, Georgia, is greater today than it was when members of the so-called white or Caucasian race were attending the said public school system.

20. The number of specialists per pupil engaged by the public school system of Taliaferro County, Georgia, is less today than it was when members of the so-called white or Caucasian race were attending the public schools of said public school system.

By specialists, I have reference to Guidance Teachers, Speech Therapists, Music Teachers, and the like.

Please take notice that a copy of such admissions must be served upon the undersigned within ten (10) days after service of these requests for admission, which service is complete upon mailing of same under Rule 5, Federal Rules of Civil Procedure.

This 18th day of December, 1967.

Interrogatories to Defendants Jones, et al.

Plaintiffs request that the defendants, Cranston Jones, W. A. Drinkard, Carl Chapman, H. E. Williams, Jr., and Mrs. Willie Mae Fambrough, as Members of the Board of Education of Taliaferro County, Georgia, each answer, separately and individually, under oath, in accordance with Rule 33, Federal Rules of Civil Procedure, the following numbered interrogatories:

1. State your name, address, age, occupation, race, and sex.
2. State how long you have been a member, or were a member, of the Board of Education of Taliaferro County, Georgia.
3. List each person with whom you served on the Board of Education of Taliaferro County, Georgia, giving the name, address, occupation, race, and sex, of each person with whom you served on the Board of Education of Taliaferro County, Georgia.
4. Give the name, address, and occupation of each member of the Negro race who served with you on the Board of Education of Taliaferro County, Georgia.
5. Give the name of any Negro who you know of as having served on a Board of Education in Taliaferro County, Georgia.
6. Do you have any children between the ages of six and seventeen? If so, give the name and address of any and all schools which said children attend.

7. Give the name and address of any white children who attend the public schools of Taliaferro County, Georgia.

8. Is busing service provided for the children who attend the public schools of Taliaferro County, Georgia?

9. Give the names, addresses, and races of those who administer the public schools of Taliaferro County, Georgia.

10. Give the names, addresses, educational background, and races of those who teach in the public schools of Taliaferro County, Georgia.

11. What is the teacher-pupil ratio in the public schools of Taliaferro County, Georgia?

12. What was the teacher-pupil ratio in these public schools in 1964?

13. What is the present per pupil expenditure in the public schools of Taliaferro County, Georgia?

14. What was the per pupil expenditure in the public schools of Taliaferro County, Georgia, in 1964?

15. How many specialists are employed in the public schools of Taliaferro County, Georgia?

16. How many specialists were employed in the public schools of Taliaferro County, Georgia, in 1964?

17. What is the number of books per pupil in the libraries of the public schools of Taliaferro County, Georgia?

18. What was the number of books per pupil in the libraries of the public schools of Taliaferro County, Georgia, in 1964?

19. What is the average number of years of higher education attained by the teachers in the public schools of Taliaferro County, Georgia?

20. What was the average number of years of higher education attained by the teachers in the public schools of Taliaferro County, Georgia, in 1964?

22. Do the public schools of Taliaferro County, Georgia, receive any funds from the federal government? If so, state the amount.

23. At any time in the past, have the public schools of Taliaferro County, Georgia, received any federal funds? If so, state the years in which such funds were received and the respective amounts.

24. Did white pupils attend the public schools of Taliaferro County, Georgia, in substantial numbers during the year 1964?

25. How many public schools are there in Taliaferro County, Georgia? Give the name, address, grades, and number of pupils of each race attending each such school.

26. What is the total budget of the public school system of Taliaferro County, Georgia?

27. What are the sources of funds for this budget? List each source and the amount contributed by it.

28. Are there any private schools in Taliaferro County? Give the name, address, grades, and number of pupils of each race attending each such school.

29. What amount has the public school system of Taliaferro County ever contributed to any such private schools within the county? List each contribution in dollars or the dollar value of any property contributed, and the year in which made.

30. In what militia district do you live?

31. How many teachers are there in the public schools of Taliaferro County today?

32. How many teachers were in the public schools of Taliaferro County in 1964?

33. Do you receive any salary or compensation as a member of the Board of Education? If so, what.

34. How many times does the Board of Education meet each month?

35. Do you have a regular time, date, and place for the meetings of the Board of Education? If so, state the same.

36. Are the meetings of the Board of Education open to the public?

37. Are the minutes made of the meetings of the Board of Education?

38. How many times have you met since September 1, 1967?

39. How many times did you meet between September 1, 1964 and January 1, 1965?

40. Is notice given to the public of the meetings of the Board of Education? If so, by what means?

41. What are the names, addresses, and races of the principals of the Taliaferro Public School System?

42. Who hires said principals?

43. What is the name, address, and race of the Superintendent of Schools for Taliaferro County?

44. Did any children of yours attend the public schools of Taliaferro County, Georgia, in 1964? If so, state which grades they attended during such years.

This 20th day of December, 1967.

Interrogatories to Defendants Fouche, et al.

Plaintiffs request that the defendants, W. W. Fouche, Rastus Durham, and Elmo Bacon, as representatives of the class of persons known as Grand Jurors of Taliaferro County, Georgia, each separately and individually, answer under oath in accordance with Rule 33, Federal Rules of Civil Procedure, the following numbered interrogatories:

1. State your name, address, race, and occupation.
2. Are you presently a member of the Grand Jury of Taliaferro County, Georgia?
3. Have you at any time in the past been a member of the Grand Jury of Taliaferro County, Georgia? If so, state the years in which you served as a grand juror.
4. Give the name and the year in which any person whom you were able to identify as a member of the Negro race served with you on the Grand Jury of Taliaferro County, Georgia.
5. While a member of the Grand Juries of Taliaferro County, Georgia, did you ever participate in the election of members of the Board of Education of said county?
6. If you did participate in such election, describe the procedure fully and completely.
7. For each of the years in which you participated in the election of Members of the Board of Education of Taliaferro County, Georgia, give the name, address, race,

and occupation of those persons who were selected to be members of the Board of Education of said county. For each of the persons you have listed, also give the year in which said person was elected.

8. Do you presently have any children who are between the ages of six and seventeen? If so, give the name and address of the school or schools which they attend.

9. To your knowledge, has there ever been a Negro who has served on the Board of Education of Taliaferro County, Georgia? If so, give the name, address and occupation of said Negro.

10. To your knowledge, are there any children of the so-called white or Caucasian race who attend any of the public schools of Taliaferro County, Georgia? If so, give the names, grades, and addresses of said white children.

11. State how many persons are on the Grand Jury Lists of Taliaferro County, Georgia. Of that number, how many are members of the Negro race? Further, of that number, how many are females?

This 20th day of December, 1967.

Interrogatories to Defendants Moore, et al.

Plaintiffs request that the defendants, E. C. Moore, Guy Beazley, J. M. Taylor, L. T. Lunceford, and Clarence Griffith, as Jury Commissioners of Taliaferro County, Georgia, each answer, separately and individually, under oath in accordance with Rule 33, Federal Rules of Civil Procedure, the following interrogatories:

1. State your name, age, address, race, and occupation.
2. For how long have you been a jury commissioner of Taliaferro County, Georgia?
3. List the name of each and every person with whom you have ever served as a jury commissioner of Taliaferro County, Georgia. For each such person, give the years in which you served with them, as well as their name, address, occupation, and race.
4. Within your memory, has there ever been a Negro jury commissioner of Taliaferro County, Georgia? If so, give the name, address, and occupation of such Negro jury commissioner.
5. How many persons are presently on the Grand Jury List for Taliaferro County, Georgia? When was this latest revision completed?
6. How many members of the present grand jury list are members of the Negro race?
7. How many members of the present grand jury list are white females?

8. How many members of the present grand jury list are Negro females?

10. Describe, in full and complete detail, the procedures which you followed in selecting persons for the grand jury list of Taliaferro County, Georgia.

11. State how you determined whether a person is upright and intelligent.

12. What significantly identifiable groups do you know of in Taliaferro County, Georgia?

13. Is the grand jury list, as presently composed, a fairly representative cross-section of the upright and intelligent citizens of Taliaferro County, Georgia?

14. If the answer to No. 13 is "yes," describe in full and complete detail the standards which you have applied in making such a determination. If the answer to the preceding question was "no," describe in full and complete detail the standards which you applied in making such a determination.

15. What steps, if any, did you personally take to insure that any and all significantly identifiable groups in Taliaferro County, Georgia, were fairly represented on the grand jury list?

16. How many names are on the official registered voter's list which you used, pursuant to law, in selecting the latest grand jury list for Taliaferro County, Georgia?

17. Of the names on the voter's list, how many are Negroes?

18. Of the names on the voter's list, how many are white females?

19. Of the names on the voter's list, how many are Negro females?

20. Describe in complete detail any and all demographic information contained on the voter's list which you used in compiling the grand jury list for Taliaferro County, Georgia.

21. If you are unable to give the number of Negroes, white females, and Negro females, on the grand jury list which you have selected, describe in full and complete detail how you were able to determine that such lists are fairly representative cross-sections of the upright and intelligent citizens of Taliaferro County, Georgia.

22. List any and all groups, associations, or social clubs to which you belong.

23. List the names of any Negroes who belong to any of the clubs or groups which you have listed in the preceding question, being sure to give not only the name of the Negro, but the name of the club to which he belongs in common with you.

This 20th day of December, 1967.

**Answers of Defendants E. C. Moore, Guy Beazley,
J. M. Taylor, L. T. Lunceford and Clarence Griffith
to Plaintiffs' Interrogatories**

The aforesaid defendants in accordance with the Federal Rules of Civil Procedure answer plaintiffs' interrogatories as follows:

1. (a) E. C. Moore, age 56, Route 1, Crawfordville, Georgia, race—white, occupation—merchant;

(b) Guy Beazley, age 67, Rayle, Georgia, race—white, occupation—mule trader;

(c) J. Milton Taylor, age 57, Crawfordville, Georgia, race—white, occupation—farmer;

(d) L. T. Lunceford, age 63, Route 1, Crawfordville, Georgia, race—white, occupation—farmer;

(e) Clarence Griffith, age 37, Crawfordville, Georgia, race—white, occupation—appliance serviceman.

2. (a) three years.

(b) I do not remember.

(c) nine months.

(d) nine months.

(e) three years.

3. (a) I have served as a Jury Commissioner for Taliaferro County, Georgia with:

a. Clarence Griffith, Crawfordville, Georgia, from August 1964 to date, occupation—appliance serviceman, race—white;

b. Guy Beazley, Route 1, Rayle, Georgia, from August 1964 to date, occupation—mule trader, race—white;

c. Reuben H. Jones, Route 2, Crawfordville, Georgia, from August 1964 to date, occupation—farmer, race—white;

d. Wallace Andrews, Robinson, Georgia, served during year 1964, occupation—farmer, race—white;

e. R. O. Edwards, Route 1, Crawfordville, Georgia, served during year 1964 and 1965, occupation—farmer, race—white;

f. J. M. Taylor, Robinson, Georgia, served during year 1967, occupation—farmer, race—white;

g. L. T. Lunceford, Route 1, Crawfordville, Georgia, served during year 1967, occupation—farmer, race—white;

(b) I do not remember.

(c) I have served with the following persons since April 1967:

a. Clarence Griffith, Crawfordville, Georgia, occupation—merchant, race—white;

b. Guy Beazley, Rayle, Georgia, occupation—farmer, race—white;

c. Reuben Jones, Route 2, Crawfordville, Georgia, occupation—merchant, race—white;

d. L. T. Lunceford, Crawfordville, Georgia, occupation—farmer, race—white;

(d) I have served with the following persons since April 1967:

- a. Clarence Griffith, Crawfordville, Georgia, occupation—merchant, race—white;
- b. Guy Beazley, Rayle, Georgia, occupation—mule trader, race—white;
- c. Reuben Jones, Route 2, Crawfordville, Georgia, occupation—farmer, race—white;
- d. E. C. Moore, Route 1, Crawfordville, Georgia, occupation—merchant, race—white.

(e) I have served as a Jury Commissioner for Taliaferro County, Georgia with the following persons. I do not remember the years I served with them:

- a. Ralph Edwards, Crawfordville, Georgia, occupation—farmer, race—white;
- b. Wallace Andrews, Robinson, Georgia, occupation—farmer, race—white;
- c. E. C. Moore, Route 1, Crawfordville, Georgia, occupation—merchant, race—white;
- d. Guy Beazley, Rayle, Georgia, occupation—mule trader, race—white;
- e. J. M. Taylor, Robinson, Georgia, occupation—farmer, race—white;
- f. L. T. Lunceford, Crawfordville, Georgia, occupation—farmer, race—white.

4. No.

5. 130; latest revision completed in 1967.

6. We do not know.

7. We do not know.

8. We do not know.

10. From the official registered voters list which was used in the last preceding general election, as a group we selected a fairly representative cross-section of the upright and intelligent citizens of the county. There was no set procedure for this selection process. We did it as a group.

11. Our determination was based upon knowledge already possessed by a jury commissioner or commissioners or upon an investigation by a jury commissioner or commissioners.

12. Among the significantly identifiable groups in Taliaferro County, Georgia, there are by race white persons and Negro persons; by religion there are Catholics, Baptists, Methodists, Presbyterians.

13. Yes.

14. We did not detail or fix any standards in making a determination as to who is upright and intelligent. As previously stated, this determination was based upon our knowledge either personal or through investigation of those persons being considered.

15. There is a jury commissioner for each district of the county. Taliaferro County is extremely small and the jury commissioners know practically all of the people

within their respective districts. Through this knowledge we tried to insure that all groups in Taliaferro County were fairly represented on the jury list.

16. Approximately 2,000.

17. We do not know.

18. We do not know.

19. We do not know.

20. None.

21. As previously stated, we relied upon the knowledge of the individual jury commissioners based upon their knowing or finding out about those persons who lived within their respective districts within Taliaferro County.

22. (a) Methodist Church

(b) Baptist Church

(c) Presbyterian Church

(d) Methodist Church

(e) American Legion, Kiwanis Club, Hunting Club

23. None

Response of Defendants to Plaintiffs' Request for Admission of Facts

1. Request No. 1 is admitted.
2. As to request No. 2, the knowledge of defendants does not encompass the period of the last fifty years; nevertheless, so far as defendants know or have reason to believe, the jury commissioners of Taliaferro County for at least fifty years have been members of the white or Caucasian race.
3. As to request No. 3, defendants do not know what plaintiffs mean by the terminology "Within recent memory". Defendants admit only that within their individual memories there have been no Negro jury commissioners of Taliaferro County, Georgia.
4. Request No. 4 is admitted.
5. So far as defendants know, request No. 5 is true and to that extent is admitted.
6. So far as defendants know, request No. 6 is true and to that extent is admitted.
7. Request No. 7 is admitted.
3. Request No. 8 is admitted.
9. The race of each of those persons whose name is now in the jury box of Taliaferro County is not sufficiently known to the defendants for them to be in position to state whether or not request No. 9 is true or false.

10. The sex of each of those persons whose name is now in the jury box of Taliaferro County is not sufficiently known to the defendants for them to be in position to state whether or not request No. 10 is true or false.

11. Request No. 11 is admitted.

12. Request No. 12 is denied because of the fact that it is completely false. At the present time, seven free school buses provide transportation for at least 95% of the students who attend the public schools of Taliaferro County.

13. In response to Request No. 13, defendants admit that the one person who administers the schools of Taliaferro County is a member of the so-called white or Caucasian race.

14. In response to Request No. 14, defendants state that the present per pupil expenditure of funds is greater today than it was when there were members of the so-called white or Caucasian race attending the public schools of Taliaferro County, Georgia.

15. Request No. 15 is admitted.

16. In response to Request No. 16, defendants state that the average level of higher education attained by the teachers in the public schools of Taliaferro County, Georgia, is today about the same as it was during the period when the public schools of Taliaferro County were attended by pupils of the so-called white or Caucasian race.

17. In response to Request No. 17, defendants state that the number of library books per pupil in the public schools of Taliaferro County, Georgia, is greater today than it was when members of the so-called white or Caucasian race were pupils in the said public school system.

18. In response to Request No. 18, defendants admit the truth of said fact and further state that the average number of pupils per classroom today is 27 and when members of the white race were also attending the public schools of Taliaferro County, the average number of pupils per classroom was 25.

19. The response to Request No. 19 is essentially the same as to Request No. 18.

20. In response to Request No. 20, defendants deny the truth of said request and state as a basis of their denial that today the Board of Education of Taliaferro County employs a full-time band director who is a specialist and that during the time that there were so-called white or Caucasian children in attendance, the Board of Education did not employ a so-called specialist but did employ a part-time college student who gave instruction in music.

**Answer of Defendants W. W. Fouche, Rastus Durham
and Elmo Bacon to First Interrogatories of Plaintiffs**

A. Answers of Elmo Bacon:

1. Elmo Bacon, Route 1, Crawfordville, Georgia, race white, occupation truck driver.

2. No.

3. No.

4. I have never served on a grand jury.

5. I have never served on a grand jury.

6. No answer required.

7. No answer required.

8. No.

9. I do not know.

10. To my knowledge I do not know of any white children attending the public schools of Taliaferro County, Georgia.

11. I do not know.

B. Answers of Rastus Durham:

1. Rastus Durham, Crawfordville, Georgia, race white, occupation Georgia State Highway Foreman.

2. Yes.

3. I have never been on a grand jury other than this one.

4. In August 1967, I remember there were two on the jury but I can only remember one name, Willie James Hughes.

5. Yes.

6. The Chairman of the Grand Jury said that a vacancy on the Board of Education existed and asked for nominations for persons. Dillard Noggles was nominated and someone seconded the nomination. The Chairman then asked for more nominations and everyone remained silent. A vote was taken and the Chairman asked that all in favor of Dillard Noggles raise their hand. As I recall, all present raised their hand.

7. I have only served one time and Dillard Noggles was elected, his address is Sharon, Georgia, race white, and his occupation is that of a mechanic. This was in 1967.

8. I have moved to Greene County, Georgia, since I served on the Grand Jury and I have one daughter named Wanda Durham who is sixteen years of age and is now attending Greene County School System.

9. To my knowledge I have never known one to serve.

10. To my knowledge there is none.

11. I do not know the answers to any part of this question.

C. Answers of W. W. Fouche:

1. W. W. Fouche, address, Crawfordville, Georgia, race white, occupation, barber.

2. No.

3. Yes, I served as a Grand Juror in 1965 and several times prior thereto, the exact dates being unknown.

4. In 1965 I was a Grand Juror and two negroes, namely Toomis Lewis and Garnett Moore, served with me.

5 and 6. Yes, the Chairman of the Grand Jury made known that there was a vacancy to be filled on the Board of Education. He stated that nominations were in order and one of the members of the Grand Jury nominated Cranston Jones. This nomination was seconded by another member of the Grand Jury. The Chairman asked several times if anyone else would make another nomination and everyone remained silent. He then asked for a vote and Cranston Jones received the vote of all members of the Grand Jury who were present in the room.

7. 1965, Cranston Jones whose address is Robinson, Georgia, race is white and occupation is a clerk. In some prior year unknown to me, I can remember being a member of the Grand Jury when Mrs. Willie Mae Fambrough was elected to the Board of Education of Taliaferro County, Georgia. I cannot recall whether or not there was more than one nomination but to my knowledge the election was held in the same manner as described in question 6.

8. None.

9. To my knowledge, there has never been a negro who served.

10. To my knowledge, there are none.

11. I have no knowledge of who is on the Grand Jury list of Taliaferro County except to the best of my knowledge I am on the list.

**Answer of Defendants Cranston Jones, W. A. Drinkard,
Carl Chapman, H. E. Williams, Jr. and Mrs. Willie
Mae Fambrough to Interrogatories of Plaintiffs**

In accordance with the Federal Rules of Civil Procedure, the aforesaid defendants answer the plaintiffs' interrogatories as follows:

1. (a) Wiley Cranston Jones, Route 2, Union Point, Georgia, 57 years old, employed as a clerk in Lunsford's Department Store, white, male;

(b) W. A. Drinkard is deceased; accordingly, no answer is filed for him;

(c) Carl L. Chapman, Crawfordville, Georgia, age 52, auto mechanic, white, male;

(d) Horace E. Williams, Jr., White Plains, Georgia, age 45, dairy farmer, white, male;

(e) Mrs. Willie Mae Johnson Fambrough, Route 1, Crawfordville, Georgia, age 62, housewife, white, female.

2. (a) Since August 30, 1965; served until I resigned as a member on June 30, 1966;

(c) Have been a member for about six years;

(d) Became a member on August 26, 1963, and served until I resigned in September of 1967;

(e) I will complete my thirteenth consecutive year of service as a member on March 2, 1968.

3. Those who have served on the Board of Education since 1964 and with whom any of the present members served are:

(a) A. J. Harper, Crawfordville, Georgia, deceased, was a farmer, white, male;

(b) J. O. Moore, Crawfordville, Georgia, farmer, white, male;

(c) Jack (J. G.) Veazy, Crawfordville, Georgia, farmer, white, male;

(d) Glenn Edwards, Crawfordville, Georgia, retired, white, male;

(e) Emerson Chew, Crawfordville, merchant, white, male;

(f) W. F. Dozier, Crawfordville, Georgia, (deceased), was a merchant, white, male;

(g) Milton Taylor, Robinson, Georgia, farmer, white, male;

(h) Carl Chapman, Crawfordville, mechanic, white, male;

(i) Horace Hill, Crawfordville, retired, white, male;

(j) Larry Veazy, farmer, white, male, Crawfordville;

(k) Moore Pittman, Crawfordville, merchant, white, male;

Mr. Veazy was appointed by the Board as was Mr. Pittman to succeed H. G. Williams, Jr. and W. A. Drinkard respectively in October of 1967.

4. No member of the Negro race served with any of us on the Board of Education.

5. We do not know of any.

6. (a) One who presently attends the twelfth grade of Jonesboro High School, Jonesboro, Georgia;

(c) None;

(d) Three, all of whom attend Greensboro High School, Greensboro, Georgia;

(e) None;

7. No white children presently attend the public schools of Taliaferro County, Georgia;

8. Better than 95% of all of the children who presently attend the public schools of Taliaferro County, Georgia, are bussed without charge to and from public school each and every school day;

9. The sole administrative employee of the Board of Education of Taliaferro County, Georgia, is Mrs. Lola H. Williams, County School Superintendent, whose race is White;

10. The answer to this question appears as Exhibit A attached hereto.

11. One to twenty-seven.

12. One to twenty-five.

13. According to the latest financial report dated June 1967, the per pupil expenditure is \$434.82.

14. \$322.76.

15. Mr. John Ruth, band director, is the specialist now employed in the public schools of Taliaferro County, Georgia.

16. Only a part-time band instructor, a University of Georgia student, was employed in 1964.

17. There are presently 8.7 library books per public school student.

18. In 1964 there were five library books per public school student.

19. Four years.

20. Four years.

22. Yes; \$63,000.00 for the school year 1967-1968.

23. Yes; the public schools of Taliaferro County, Georgia, like all other public schools in the State of Georgia have received federal funds through the State Department of Education. Other than those funds, in 1966-1967 the public schools of Taliaferro County, Georgia received directly \$63,000.00 of federal funds.

24. Yes.

25. There are two public schools in Taliaferro County, Georgia—Taliaferro County Elementary School, grades 1 through 7 having an average daily attendance of Negro pupils of 283, and Taliaferro County High School, grades 8 through 12 having an average daily attendance of 175 Negro pupils.

26. \$267,611.65.

| | |
|--|--------------|
| 27. Ad Valorem taxes | \$ 39,000.00 |
| State of Georgia Allotment | 112,488.69 |
| Transferred and Special Title I Funds | 65,253.70 |
| Liabilities carried forward for items such as withholding and social security | 25,500.00 |
| Money carried forward from previous years | 22,500.00 |

28. Yes; no defendant answering these interrogatories has had any connection or association with said private school. Wiley Cranston Jones knows only that there are one through ten grades in said school; Carl L. Chapman knows nothing about said school; Mrs. Willie Mae Frambrough knows nothing about said school and Horace E. Williams knows that the school is named Crawfordville Baptist School, its address is Crawfordville, Georgia, it has the first through tenth grades, approximately seventy-two pupils attend the entire school, how many attend each grade is not known, all of the pupils of this private school are of the white race.

29. Not the first penney has been contributed to any such private school within Taliaferro County.

30. (a) Wiley Cranston Jones, 607 GM;
 (b) W. A. Drinkard did live in 172 GM;
 (c) Carl Chapman, 603 GM;
 (d) H. E. Williams, Jr., 608 GM;

(e) Mrs. Willie Mae Frambrough, 604 GM;

31. Eighteen teachers.

32. Thirty-three teachers.

33. Each active member of the Board of Education receives a total of \$20.00 per month.

34. The Board of Education meets regularly once each month.

35. Yes, at 10:00 A. M. on the first Tuesday in each month in the office of the County School Superintendent, Taliaferro County Courthouse, Crawfordville, Georgia.

36. Yes.

37. Yes.

38. We have met at the regular meeting time every month since September 1, 1967.

39.

40. As required by the laws of Georgia, public notice has been given in the county newspaper, the *Advocate-Democrat* of the regular meeting time, date and place. Notice of each particular meeting is not given.

41. Johnny Warren, Sparta, Georgia, Negro.

W. H. Teddleton, Crawfordville, Georgia, Negro.

42. The Board of Education, upon recommendation of the Superintendent.

43. Mrs. Lola H. Williams, Crawfordville, Georgia,
white.

44. (a) One—attended ninth grade;

(c) None;

(d) Yes—fifth, seventh and eighth grades;

(e) None.

EXHIBIT "A" ANNEXED TO ANSWERS OF
DEFENDANTS JONES, ET AL.

PRESENT TEACHER ENROLLMENT

| Teacher | Race | Address | Four Year College Degree From: |
|----------------|-------|--------------------|-----------------------------------|
| M. Chatman | Negro | Crawfordville, Ga. | Savannah State |
| J. Cheely | Negro | Crawfordville, Ga. | Savannah State |
| J. Warren | Negro | Crawfordville, Ga. | Savannah State |
| C. W. Williams | Negro | Crawfordville, Ga. | Savannah State |
| A. Ellington | Negro | Crawfordville, Ga. | Savannah State |
| M. Hackney | Negro | Crawfordville, Ga. | Savannah State |
| R. Cheely | Negro | Crawfordville, Ga. | Savannah State |
| M. Mattox | Negro | Crawfordville, Ga. | Savannah State |
| M. Moss | Negro | Crawfordville, Ga. | Savannah State |
| F. Nichols | Negro | Crawfordville, Ga. | Savannah State |
| W. Watson | Negro | Crawfordville, Ga. | Albany State |
| W. Kennedy | Negro | Crawfordville, Ga. | Allen University |
| U. Evans | Negro | Crawfordville, Ga. | Clark College |
| R. Marion | Negro | Crawfordville, Ga. | Benedict |
| L. Davis | Negro | Crawfordville, Ga. | Benedict |
| J. D. Ruth | Negro | Crawfordville, Ga. | Albany State |
| M. Alexander | Negro | Crawfordville, Ga. | Atlanta University |
| W. Teddleton | Negro | Crawfordville, Ga. | Albany State |
| R. Williford | Negro | Crawfordville, Ga. | Florida State |

Jury Lists

GRAND JURORS 1967

GEORGIA, Taliaferro County;

In accordance with order passed by Judge Robert L. Stevens, on the 3rd day of April, 1967, directing the Jury Commissioners of Taliaferro County to meet and revise both Grand and Traverse Jury Lists, in compliance with the existing laws relative thereto, as soon as practicable, said Jury Commissioners hereby certify that they met on the 18th and 19th days of April, 1967, in called session, pursuant to the above order and have revised the Jury Boxes, both Grand and Traverse, and further certify that the tickets containing their names have this day been placed in the Grand Jury Box.

| | |
|-------------------|-----------------------|
| J.W.Archison | Edgar W Chew, |
| J.W.Andrews | W.O.Chapman |
| Arthur D Brown | W.R.Chapman |
| R.A.Bedgood | Earl Chapman |
| Paul Bird | B.R.Darden |
| C.E.Bonner | Pat H Darden |
| Geo.W.Brown | K.Willie Dye |
| Gwin Bird | Rastus Durham |
| Geo.H.Brown | L.R.Dozier |
| Guy Beazley | Eulous Dotson |
| Willie Billingsly | J.P.Ellington, Jr |
| Melvin L. Cox | Loyd W Echols |
| J.W.Clemmons | L.B.Edwards |
| George L.Clemmons | Willie George Edwards |
| J.P.Crawford | R. O. Edwards |
| H.Hayes Chew | L.A.Edwards |

J.D.Edwards
 Dwellie Evans,
 Roosevelt Ellington
 Wales T Flynt
 Jesse W. Flynt
 Richard Fowler,
 W.W.Fouche
 Richard H Flynt,
 George Fambrough
 Mark Greene
 Sam D. Greene
 Clarence Griffith
 Charles W Greene
 T.C.Harrington,
 B.L.Hollis
 C. J.Hill
 Wm. J.Hall
 Jack H Hubert
 Ernest Godbee
 Cecil Hunter
 W.J.Hughes
 Miles Hackney
 H.F. Johnson
 Warren Y.Johnson
 Reuben H. Jones
 Eulous Harris
 Rev. Floyd T. Jenkins
 W. Cranston Jones.
 Roger M. JONES
 William H.Jackson
 Thos/Irby Jackson
 Hill B.Jackson
 Lewis B.Kendrick

Terrell Lyle
 Fred Lunceford
 Louis Lunceford
 Owens V Lunceford
 Hawes Lunceford
 David Lindsey
 H.A.Morrow
 Earl H Lucas
 Robert Morris
 Frank Mitchell III
 F.G.Mitchell Jr
 Eulous C Moore
 J.Owen Moore
 Henry G. Moore Jr.
 W.W.Moore
 W.E.Meadows
 Carson Monerief
 Nathaniel Mapp
 Garnett M.Moore
 Robert Maltbie
 T.F.Mulkey
 T.Girdwood Macfie
 Wm. N. Noggle
 Joe D Noggle
 Mitchell Noggle
 W.E.Neal
 Emory Neal
 Joe Ogletree
 Jack Pittman
 J. C. Pierce
 J.A.Poss
 E. W.Reynolds
 Joe C Rhodes

W.R.Rhodes Sr
HenryS Rhodes
W.H.Rhodes
Foster Rhodes
Marvin H.Rhodes
Horace C Rhodes
Jack Sturdivant
Gordon A Sherrer
Oscar C Stewart
Dennis Sanders
Lonnie Stewart
Colon S Stewart
Genever B Stewart
James Milton Taylor
William Glenn Taylor
Alonza Taylor

Ollie Taylor
Omer Taylor
Marvin Taylor
Wilbur C Taylor
Ralph B.Taylor
John G. Veazey
Larry Veazey
Marvin Veazey
J.Veazey Wynne
M.M.Wheeler
E.L.Williams
H.R.Williams
Cohen Wright
Troy H. Vickers
James Yearwood
George Williams Jr.

CERTIFICATE.

GEORGIA, Taliaferro County;

We the undersigned Jury Commissioners of Taliaferro County and the Clerk of the Superior Court of said County acting as Clerk of said Board, do hereby certify that the foregoing two pages contain a true and correct list of persons selected by the said Jury Commissioners to serve as GRAND JURORS, and we further certify that the tickets containing their names have this day been placed in the Grand Jury Box, and Box sealed according to law.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this April 19, 1967.

E. C. MOORE, Jury Commissioner
Guy F Beazley, Jury Commissioner
J. M. Taylor, Jury Commissioner

ATTEST

Ralph W. Golucke, Clerk Superior Court acting as Clerk of said Board.

L.T.Lunceford Jury Commissioner
Clarence Griffith, Jury Commissioner

Georgia, Taliaferro County;

I, Ralph W. Golucke, Clerk of the Superior Court in and for the County of Taliaferro, hereby certify that the within and foregoing two pages, contain a true and correct copy of Grand Jury List, 1967, of said County, as the same appears of record in Jury Book B, pages 194/195, in the office of the Clerk of the Superior Court of said County.

Given under my hand and seal of office, this 15th day of January, 1968.

/s/ RALPH W. GOLUCKE
Clerk Superior Court
Taliaferro County, Ga.

TRAVERSE JURORS 1967.

GEORGIA, TALIAFERRO COUNTY:

In accordance with order passed by Judge Robert L. Stevens, on the 3rd day of April, 1967, directing the Jury Commissioners of Taliaferro County to meet and revise both the Grand and Traverse Jury Lists, in compliance with the existing laws relating thereto, as soon as practicable, said Jury Commissioners hereby certify that they met on April 18th, and April 19th, 1967, in called session, pursuant to the above order, and have revised the Jury Boxes, both Grand and Traverse, and further certify that the tickets containing their names, have this day been placed in the TRAVERSE JURY BOX.

| | |
|---------------------|--------------------|
| E. D. Ansley | Guy F Neazley |
| J. W. Atchison | Willie Billingsley |
| B. B. Atchison | Joel M. Casper |
| Charles Atchison | Melvin L. Cox |
| Wallace Andrews | J.W.Clemmons |
| Jimmie Andrews | Geo L. Clemmons |
| Alvester Armstrong | J.P.Crawford |
| Luther Armstrong | H. Hayes Chew |
| Arthur D. Brown | Edgar W.Chew |
| R.A.Bedgood | W.O.Chapman |
| Willie G.Bird | S. W. Chapman |
| Paul Bird | W.R.Chapman |
| C. E. Bonner | Carl Chapman |
| George W.Brown | J.A.Clements |
| Glinn Bird | Earl Chapman |
| George Harris Brown | J.S.Callaway |
| Elmo Bacon | DorseyCombs, |

L.E.Oradillo
 W. A. Drinkard
 K.Willie Dye
 W. H. Davis
 Rastus Durham
 B. R. Darden
 George Darden
 Pat H Darden
 L.R.Dozier
 Roy Dozier
 Dock Davis Sr
 EulousDotson
 J.P.Ellington,Jr
 Loyd E.Echols
 Connie R. Edwards
 Willie George Edwards
 Ralph O.Edwards
 Gary Edwards
 Thomas F.Edwards
 Brewer Edwards
 Wilson Edwards
 J.D. Edwards
 Colelough Evans
 J. R. Evans
 Preston D Edwards
 Dwellie Evans
 Roosevelt Ellington
 Garnett Evans
 Wales T Fkynt
 Jesse W.Flynt
 Jimmie Purks Flynt
 John L. Flynt,
 Richard Fowler

Gray Fowler
 Floyd Freeman
 Grover Frazier
 W. W. Fouche
 Richard H. Flynt,
 George A. Fambrough
 Henry N.Fouche
 Paul Gunn
 Mark H.Greene,
 Sam D Greene
 Charles W.Greene
 Clarence AGriffith
 William Grant,
 Ernest Godbee
 C.J. Hill
 H.W.Hill
 B.L.Hollis
 Alvin S Harwell
 J.W.Harrison
 T.C.Harrington
 Wm.J.Hall
 Jack Hubert
 Dock Harrison
 G.W.Hunter
 Cecil Hunter
 Manuel Hunter
 Aubrey Harris
 Felix House
 C.M.Harris
 Eulous Harris
 Willie J.Hughes
 Miles Hackney
 O.W.Irvin

M.L.Johnson
 H.F.Johnson
 Warren Y.Johnson
 Aubrey Johnson
 Reuben H. Jones
 W.M.Jones Jr.
 Rev.Floyt T.Jenkins
 J.C.Jordan
 W. Cranston Jones
 Roger M.Jones
 Geo.M.Jackson
 Wm.H.Jackson
 Hill B.Jackson
 Thos.Irby Jackson
 Lewis B. Kendrick
 Harold H Kendrick
 Vincent A.Kealey
 Julian Kendrick
 J.C.Lyle
 Terrell Lyle
 Victor C Linten
 Fred Lunceford
 Louie Lunceford
 Owens V.Lunceford
 Hawes Lunceford
 Earl H Lucas
 D.A.Lyle
 David Lindsey
 Tommie Lewis
 H.A.Morrow
 Robert Morris
 Carson Moncrief
 Walter G. Melson

F.G. Mitchell Jr
 Frank Mitchell III
 Jack H.Mitchell
 Eulous Moore
 Jamie A.Moore
 J.Owen Moore
 R.Edward Moore
 A.D.Moore Jr
 Henry G Moore Jr
 W.W.Moore
 W.E.Mwadows
 Garnett M.Moore
 Nathaniel Mapp
 Europe Manago,Sr.
 Howard E.Miller
 T.F. Mulkey
 Robert F.Maltbie
 Timmie H.Moore
 Ralph McAvoy
 James F McNair
 T.Girdwood Macfie
 F.B.Merritt Jr
 Mitchell Noggle
 Joe D.Noggle
 William N.Noggle
 J.D. Nash
 W. E. Neal
 Emory Neal
 Bobby K.Neal
 Kenneth Nunn
 Billie K.Neal
 Raymond Nox
 Joe Ogletree

| | |
|-----------------------|----------------------|
| Hal S.Ogletree | BoyceSmith |
| W. A. Owens | Otis Simons |
| Jack Pittman | Thomas Simons, |
| J.C. Pierce | Leonard Shelton |
| L.O.Macbeth | Emmett A.Taylor |
| J.A.Poss | J.Louis Taylor |
| Patrick S.Pate | J.Milton Taylor |
| Babe Reese | Dennis Sanders |
| John Reese | Horace Stewart |
| Foster Rhodes | Henry Stewart |
| Luke Rhodes | John Shorter |
| Marsby Reid | Lonnie Stewart |
| Marvin H Rhodes | Dock Stewart |
| Henry S Rhodes | Clarence Sherrer |
| W.W.Rhodes Sr., | William Glenn Taylor |
| Joe C Rhodes | Robert Alonze Taylor |
| Ray Rhodes | Ollie Taylor |
| Horace C Rhodes | Ralph B.Taylor |
| Clinton Rhodes | Wilbur C.Taylor |
| Bobby Rocker | Omer Taylor |
| E.W.Eeynolds | E.Marvin Taylor |
| Otis Ray | James M.Taylor |
| Herbert Rhodes | Ernest B.Turner |
| Horace Lee Rhodes | Raymond Turner |
| George Angus Richards | J.W.Thaxton Sr. |
| Harold R Stewart | J.W.Thaxton Jr |
| Jack Sturdivant | Jack G Veazey |
| Goreon Sherrer | Marvin L.Veazey |
| Chas. I. Swann | Larry Veazey |
| Oscar C Stewart | Troy H Vickets |
| James H Stewart | John W.Wynne |
| Genever B .Stewart | W.E.Watson |
| Colon S Stewart | M.M. Wheeler |

H.E.Williams Sr
 Horace E Williams Jr.
 E.L.Williams,
 H.H. Williams
 George Williams Jr.
 Cohen Wright
 Lithier A.Wright
 L.E.Williams
 C.T.Woodruff
 James Yearwood,
 Rudopf Yearwood
 Joe M.Turner
 Jim Ware
 Mrs. E. D. Ansley
 Clarice Armstrong
 Willie C .Armstrong
 Mrs.George W. Brown,
 Miss Josie Bird
 Mrs.C.E.Bonner
 Mrs. W. G. Bird
 Minnie Lee Bailey
 Elizabeth . Bird
 Essie Boone
 Mrs.Grace Beazley
 Mrs.Carl Chapman
 Mrs.Helen S Chapman
 Mrs.Annie Cox
 Mrs. Mary (Pat) Darden
 Ruth Dooley
 Mrs.Helen Bedgood Dozier
 Ollie B.Dynn
 Mrs.L.R.Dozier
 Annie B Ellington

Mrs,J.P.Ellington,Jr
 Emma Evans
 Mrs.Pearl Fowler
 Mrs.Willie M.Fambrough
 Mrs.L.A.Edwards
 Mrs.Richard H Fkynt
 Mrs.Ethel Maude Flynt
 Mrs.Frances W Greene
 Mrs.NBarbara Griffith
 J.W.Harrison
 Margie Hughes
 George Hughes
 Mattie B.Hackney
 Mrs. Myra Jackson
 Mrs.Loudelle Johnson
 Mrs.Reba Harrington
 Mrs.Mary Agnes Lyle
 Mrs.Dorothy L.Linton
 Mrs.Carson Monerief
 Mrs.Louise Moore
 Mrs. W. W. Moore
 Emma Mapp
 Jessie Meadows,
 MrsRobert Morris
 Mrs.Shirley Nogglem
 Lilleie Mae Peek
 Mrs,Louise Patrick
 Sammie D Randolph
 Mrs,Lois Richards
 Mrs.Peggy N.Rhodes
 Mrs.Flora Swann
 Mrs.Vanilia P.Sales
 Clyde Sales

Willie Golden Stewart
 Mrs.Colon S Stewart
 Mrs.GordonSherrer
 Mrs.Blanche Sturdivant
 Mrs/Marie Taylor
 Mrs.Ralph B.Taylor
 Mrs.Doris Teddleton
 Mrs.Ernest B.Turner
 Florence Turner
 Wm.H.Teddleton
 Mrs.Robert Alinze Taylor
 Lucy Young
 Mrs.Patsy Moore Watson
 Winnie Lee Ware
 Miss Faye Wright

Buddell Ware
 Caesar Williams
 Mrs.J.Veazey Wynne
 Mrs.H.M.Wynne Jr
 Mrs.Owens Lunceford
 Mrs Cohen Wright
 Henry Horton
 Louis Patruck
 Haigler Shorter
 Wylie Chenault
 Bill Johnson
 Byron Stephens Sr
 William Henry Gunn
 Jessie Golatt
 W.H.Rhodes,

CERTIFICATE

GEORGIA, Taliaferro County;

We, the undersigned Jury Commissioners of Taliaferro County, and the Clerk of the Superior Court of said County, acting as Clerk of said Board, do hereby certify that the foregoing five pages contain a true and correct list of persons selected by the said Jury Commissioners to serve as Travers Jurors, and we further certify that the tickets containing their names have this day been placed in the Traverse Jury Box, and box sealed, according to law. IN TESTIMONY WHEREOF, we have herein set our hands and seals, this April 19th, 1967

E. C. Moore, Jury Commissioner
Guy F Beazley, Jury Commissioner
J.M.Taylor, Jury Commissioner
L. T. Lunceford, Jury Commissioner
Clarence Griffith, Jury Commissioner

Attest:Ralph W.Golucke

Clerk Superior Court, Taliaferro County, acting as Clerk of said Board.

Georgia, Taliaferro County;

I, Ralph W. Golucke, Clerk of the Superior Court of said County, hereby certify that the foregoing three pages is a true and correct copy of Traverse Jury list, of Taliaferro County, Ga.

Witness my hand and seal, this 15th day of January, 1968

Ralph W. Golucke
Clerk Superior Court

Motion to Intervene by State of Georgia

COMES NOW the State of Georgia and pursuant to Rule 24(b) of the Federal Rules of Civil Procedure moves the Court for leave to intervene as a defendant in this action in order to assert the defenses set forth in its proposed answer, a copy of which is attached hereto, on the ground that the complaint asserts that a constitutional provision of the State of Georgia, as well as certain statutes enacted by the General Assembly of said State, are violative of the United States Constitution. The State of Georgia has a self-evident interest in asserting the validity of its own constitution and statutory enactments, with such interest being expressly recognized by federal statute, to wit: 28 U. S. C. § 2284(2).

WHEREFORE, movant prays that this its motion to intervene be inquired into and sustained by the Court and that it be permitted to intervene as a defendant in the above styled action.

Order 65

The cause
the State of **Georgia to Intervene**
fendant, and
should be pe on to be heard on the motion of
leave to intervene as a party de-

ORDERED, Ag to the court that said movant
has leave to intervene as prayed, it is hereby:
party defen

This 22 d^e DECREED that the State of Georgia
this cause and is hereby made a
above styled action.

y 1968.

GRIFFIN B. BELL

United States Circuit Judge

LEWIS R. MORGAN

United States District Judge

FRANK M. SCARLETT

United States District Judge

Defenses and Answer of Defendant-Intervenor

FIRST DEFENSE

Defendant-intervenor moves that the three-judge Court heretofore convened in the above styled action be dissolved and the case remanded for consideration by a single district judge on the ground that the constitutional attacks which plaintiffs make upon a constitutional provision and various statutory enactments of the State of Georgia do not present a single substantial federal question, are colorable only and are made solely for the purpose of securing a three-judge district court.

SECOND DEFENSE

Defendant-intervenor answers plaintiffs' complaint as follows:

1.

Defendant-intervenor is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations of paragraphs 1 and 2 of the complaint.

2.

In answer to paragraphs 3, 4 and 5 of the complaint, defendant-intervenor is without knowledge or information sufficient to enable it to form a belief as to the truth of the factual allegations of said paragraphs. The allegations as to the manner and capacity in which the named defendants are being sued constitute legal contentions requiring no answer.

3.

While paragraph 6 of the complaint consists of legal conclusions which require no answer, defendant-intervenor expressly denies that federal jurisdiction can properly be predicated upon alleged facial unconstitutionality of the attacked constitutional provision and statutes of the State of Georgia.

4.

Defendant-intervenor denies the allegation of paragraph 7 of the complaint.

5.

Defendant-intervenor is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations of paragraphs 8, 9 and 10 of the complaint.

6.

In answer to paragraph 11 and the various subparagraphs thereunder, defendant-intervenor denies that the named defendants have chosen and threaten to continue to choose an all-white school board to superintend the all-black public schools of Taliaferro County pursuant to State constitutional provision or statutes. Answering the subparagraphs of said paragraph 11, defendant-intervenor says:

a. That the language of Article VIII, Section V, Paragraph I of the Constitution of the State of Georgia (Ga. Code Ann. § 2-6801) is correctly set forth in subparagraph (a) of paragraph 11 of the complaint but that Article VIII, Section V, Paragraph II (Ga. Code Ann. § 2-6802) further provides:

"Notwithstanding provisions contained in Article VIII, Section V, Paragraph I (§ 2-6801) of the Constitution, or in any local constitutional amendment applicable to any county school district, the number of members of a county board of education, their term of office, residence requirements, compensation, manner of election or appointment, and the method for filling vacancies occurring on said boards, may hereafter be changed by local or special law conditioned upon approval by a majority of the qualified voters of the county school district voting in a referendum thereon. Members of county boards of education shall have such powers and duties and such further qualifications as may be provided by law."

The allegation of said subparagraph (a) that Article VIII, Section V, Paragraph I of the Georgia Constitution is violative of the Fourteenth or Thirteenth Amendments to the United States Constitution is expressly denied by defendant-intervenor.

b. That Ga. Code Ann. §§ 32-902, 32-902.1, 32-903 and 32-905 are correctly quoted in subparagraph (b) of said paragraph 11 of the complaint but that it is denied that said statutory provisions are violative of the Fourteenth or Thirteenth Amendments to the United States Constitution as alleged by plaintiffs.

c. That Ga. Code Ann. § 59-101 is correctly quoted in subparagraph (c) of said paragraph 11 but that it is denied that said statutory provision is violative of the Fourteenth or Thirteenth Amendments as alleged by plaintiffs.

d. That Ga. Laws 1967, p. 251 (Ga. Code Ann. § 59-106) is correctly quoted in subparagraph (d) of said paragraph

11 but that it is denied that said statutory provision is violative of the Fourteenth or Thirteenth Amendments as alleged by plaintiffs.

7.

Defendant-intervenor is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations of paragraphs 12, 13, 14, 15, 16, 17 or 18 of the complaint.

8.

Defendant-intervenor denies the allegations of paragraphs 19 and 20 of the complaint.

THIRD DEFENSE

Answering plaintiffs' complaint further, defendant-intervenor shows the Court as follows:

1.

That the State constitutional provision and statutes attacked by plaintiffs set forth reasonable procedures for the selection of members of county boards of education, county jury commissioners and county grand jurors.

2.

That within the inherent limitations caused by the use of words rather than mathematical equations the standards for qualification and eligibility set forth in the attacked statutes are sufficiently clear and definite to permit persons of ordinary intelligence to administer the same in a fair and impartial manner.

3.

That said constitutional provision and statutes are on their face wholly devoid of racially discriminatory provisions and plaintiffs' contention of facial invalidity is without merit.

WHEREFORE, having fully answered and presented these its defenses to plaintiffs' complaint, defendant-intervenor prays that to the extent that plaintiffs seek an adjudication or declaration of the facial unconstitutionality or invalidity of the aforesaid constitutional provision and statutes of the State of Georgia, their prayers be denied and that the three-judge Court be dissolved with all remaining issues remanded for consideration by a single district judge.

Order Dismissing Defendant Grand Jurors

On motion of the defendants, the defendants W. W. Fouche, Rastus Durham and Elmo Bacon, individually and in their capacities as Grand Jurors of Taliaferro County, Georgia, are hereby struck as defendants.

So ORDERED, this 30 day of January, 1968.

GRIFFIN B. BELL

United States Circuit Judge

FRANK M. SCARLETT

United States District Judge

LEWIS R. MORGAN

United States District Judge

Motion to Intervene as Additional Parties-Plaintiffs

The following named adult and minor Negro citizens of the United States and of the State of Georgia, residing in the City of Crawfordville, Taliaferro County, Georgia, move the Court for leave to intervene as parties-plaintiffs for themselves and all others similarly situated:

Joseph Heath, father and next friend of Lois Catherine Heath (age 15), Helen Marie Heath (age 14), Leola Heath (age 12), Lynns Delton Heath (age 10), Linda Gail Heath (age 8), and Anna Laura Heath (age 5).

The grounds for this motion are:

1. Applicant, Joseph Heath, seeks leave to intervene herein in order to assert his claims under the complaint and the motions heretofore filed by the plaintiffs. Applicant is 54 years of age and is not a freeholder in Taliaferro County, Georgia.

2. Each of the minor applicants attend school in Taliaferro County, Georgia, operated by the defendant Board of Education, the members of which are elected by the Grand Jury of Taliaferro County, which in turn is selected by the Jury Commissioners of said County, pursuant to the constitutional provisions and statutes alleged and set forth in plaintiffs' complaint.

3. Applicants adopt the allegations and prayers contained in the complaint and motions heretofore filed by the plaintiffs herein.

WHEREFORE, applicants move for leave to intervene as parties-plaintiffs in this action.

Order

Upon consideration of the above and foregoing motion, the same is allowed and ordered filed, subject to motions and objections.

This 23 day of February, 1968.

GRIFFIN BELL

United States Circuit Judge

FRANK A. SCARLETT

United States District Judge

LEWIS R. MORGAN

United States District Judge

Report to the Court of Counsel for the Remaining Defendants

Toward the conclusion of the hearing in Augusta on January 23, Circuit Judge Bell stated from the bench:

"Now, on the main question, which is that there are no Negroes on the Board of Education. I don't know just what the Court can do about that, but I know that there is no one here that's a party defendant that would think that situation can continue. That just simply will not do. Now, how it can be worked out, I don't know. It is a bad thing in this country to call on the courts to solve all the problems. If you can govern yourselves, the citizens ought to solve some problems, and it may be that between now and the 23rd you can work out some way to solve the situation. There are two places, as I see it, on the School Board that have not been permanently filled. There are two men who have been elected by the school board but the grand jury hasn't confirmed them. If those two men would willingly stand aside the other members might select two outstanding Negro citizens who are land owners and good citizens to go on the Board. If you don't want to do that—I told you in the beginning that this was a pre-trial conference as well as a hearing, if you don't want to do that we will know that on the 23rd. If you can do that, it will be an act of statesmanship on the part of somebody who is able to get something like that done; but you all are living in the county together and some how another you are going to have to keep living in the county together, and you can't have an all Negro

school and all white school board, because somewhere along the line some court will do something about that. I guess this is the first case of this kind that has come up, but just by second nature almost to a judge now knows that that sort of thing can't continue, so the Court would hope that the citizens of Taliaferro County can solve these problems themselves, and that when we get down to Brunswick that we could terminate this matter by the grand jury list having been reconstituted and some relief having been granted to these Negro citizens about their schools. If they had somebody on the School Board they could get a hearing. You have got a right to get a hearing before any public official. And every Negro has got the same right, identical rights, as any white person before any officer of the law. We all know that. Now, we are going to leave the case in that posture, at that juncture, and set it over until February 23rd at 9:30 in Brunswick, and I hope by that time we will have the Taliaferro County situation worked out. Mr. Bloch you are a fine lawyer and an experienced man in this sort of thing and I think it is time for the people to work this out. There will be communication. All you need is for somebody to get in an office somewhere and you will have plenty of communication."

And, also:

"... but you will have to advise your clients what the law is on that, what is a legal composition of a grand jury, but the Court would hope that you would be generous in your composition."

Subsequently, on his own motion, on the 26th day of January, 1968, the Honorable Robert L. Stevens, Judge of the Superior Court of Taliaferro County, Georgia, promulgated an order reading as follows:

“Georgia, Taliaferro County;

“A Three Court Federal Court Tribunal, in a case involving the Taliaferro County Board of Education and the Taliaferro County Board of Jury Commissioners, et al. on the 23rd day of January, 1968, having orally ordered that the Traverse and Grand Jury Master Lists be revised in Taliaferro County, Georgia, it is Ordered as follows, to wit;

“That the Grand Jury of Taliaferro County, Georgia, drawn to serve at the regular February Term, 1968, of the Superior Court of said County be and they are hereby discharged from service at said Term of Court and the Sheriff of said County is ordered to not serve them to appear at said term of Court, it having been orally ordered by said Federal Court Tribunal that the Grand Jury Master List is improperly and unlawfully constituted;

“That the Jury Commissioners or Revisors of Taliaferro County, Georgia, revise both the Grand and Traverse Jury Lists for said County to comply with the oral pronouncement of said Federal Court Tribunal, the said lists heretofore composed being declared to be improperly and illegally composed. Said revision shall be made at the earliest and most convenient time.

"It is ordered that this order be spread upon the Minutes of the Court by the Clerk of said Superior Court.

"This the 26th day of January, 1968.

"Robert L. Stevens
Judge of Superior Court of
Taliaferro County, Georgia"

This order was filed in the office of the Clerk of the Superior Court of Taliaferro County on January 26, 1968, and recorded in the minutes of the Clerk of the Superior Court in Book L, page 57, on that date.

* January 26, 1968, was a Friday.

Having heard of the order, the Jury Commissioners consulted with their counsel in Macon practically simultaneously with its promulgation.

The Jury Commissioners met beginning on the Monday following the order, to wit, January 29, 1968. They had for their consideration the list of persons who were registered to vote in the last general election. That list contained a total of 2,152 names. We are advised that the Jury Commissioners considered each and every name in that list. When the Commissioners did not have any information with respect to a particular individual, they asked other people in the community about him or her. In particular, when they did not know about persons of the Negro race, they asked Negro people about them. In considering each and every name they eliminated the following numbers of names without regard to race for the following reasons:

| | |
|--------------------------|-----|
| Poor health and over-age | 374 |
| Under 21 years of age | 79 |

| | |
|--|-----|
| Dead | 93 |
| Persons who maintained Taliaferro County as a permanent place of residence but were most of the time away from the county | 514 |
| Persons who requested to be eliminated from consideration | 48 |
| Persons about whom information could not be obtained | 225 |
| Persons of both the white and Negro race who were rejected by the Jury Commissioners as not conforming to the statutory qualifications for juries either because of their being unintelligent or because of their not being upright citizens | 178 |
| Names on voters lists more than once | 33 |

This left a total of 608 names. Since 608 names are more than the Jury Commissioners deemed to be needed in the traverse jury box, they arranged these 608 names in alphabetical order, and took every other name on the list alternately and placed those names on the traverse jury list. This left a total of 304 names, and only then did the Commissioners look to see how many of these 304 names were those of Negroes and how many were those of whites. They determined that 113 were Negroes and 191 were white.

Their next task was to select not more than two-fifths of this traverse jury list for the grand jury list. They decided that the fairest system would be to draw names by lot. They drew a total of 121 names by lot and put those names

93

514

48

225

178

33

ames are more
needed in the
names in alpha-
n the list alter-
verse jury list.
en did the Com-
304 names were
hose of whites.
l 191 were white.
han two-fifths of
st. They decided
w names by lot.
put those names

on th
see h
the v
of Ne 79

Af

been Having done that, they looked to
their Negro race and how many of
by thertained that 44 were the names
Courames of whites.

vide and traverse jury lists had just
Judge all the names had been put in

Ths, a new grand jury was drawn
the L. Stevens, Judge of the Superior
and ty, Georgia, in the manner pro-
who 32 grand jurors were drawn by
ferr were Negroes and 23 whites.

for ed on Friday, February 16, for
resi the regular business of the court
terr confirming or rejecting persons

Che Board of Education of Talia-
of I succeed Horace E. Williams, Jr.
Jur st 25, 1968, Mr. Williams having
bee Albert Drinkard, deceased, for a
Dri 1969.

Tro, had been chosen by the Board
Ed the next meeting of the Grand
tut who is of the white race, had
T of Education to succeed Albert
jur term expiring August 23, 1969.
ions, or choices by the Board of
by the grand jury, thus consti-
dance with the law.

serving consisted of 23 grand
hites and 6 Negroes.

lly submitted,

CHARLES J. BLOCH
Of Counsel for the
Remaining Defendants

SUMMARY

| | |
|--|-------|
| Names on the Voters List | 2,152 |
| Poor health and over-age | 374 |
| Under 21 | 79 |
| Deceased | 93 |
| Persons who maintain Taliaferro County as a permanent place of resi- dence but spend most of the time away from that county | 514 |
| Requests not to serve | 48 |
| No information available as to | 225 |
| Rejected | 178 |
| Duplications | 33 |
| Total left for consideration | 608 |
| Placed on traverse jury list | 304 |
| Of whom 113 are Negroes and 191 white | |
| Placed on grand jury list | 121 |
| Of whom 44 are Negroes and 77 white | |
| Percentage of Negroes on traverse jury list | 37% |
| Percentage of Negroes on grand jury list | 36% |
| Percentage of Negroes on first grand jury drawn according to law by Judge Stevens | 28% |

Defendants' Exhibit 1

GEORGIA, Taliaferro County:

A three Judge Federal Court Tribunal, in a case involving the Taliaferro County Board of Education and the Taliaferro County Board of Jury Commissioners, et al. on the 23rd day of January 1968, having orally ordered that the Traverse and Grand Jury Master Lists be revised in Taliaferro County, Georgia, It is Ordered as follows, to-wit;

That the Grand Jury of Taliaferro County, Georgia, drawn to serve at the regular February Term, 1968, of the Superior Court of said County be and they are hereby discharged from service at said term of Court and the Sheriff of said County is ordered to not serve them to appear at said term of Court, it having been orally ordered by said Federal Court Tribunal that the Grand Jury Master List is improperly and unlawfully constituted;

That the Jury Commissioners or Revisors of Taliaferro County, Georgia, revise both the Grand and Traverse Jury Lists for said County to comply with the oral pronouncement of the said Federal Court Tribunal; the said Lists heretofore composed being declared to be improperly and illegally composed. Said revisions shall be made at the earliest and most convenient time.

It is Ordered that this order be spread upon the Minutes of the Court by the Clerk of said Superior Court

This the 26th day of January, 1968

ROBERT L. STEVENS

*Judge of the Superior Court of
Taliaferro County, Georgia.*

Georgia, Taliaferro County;
Filed in office, this the 26th day of January, 1968
RALPH W. GOLUCKE, *Clerk Superior Court*

Georgia, Taliaferro County
Recorded Minutes L. page 57, 26th day of Jan., 1968
RALPH W. GOLUCKE, *Clerk Superior Court.*

I hereby certify the above to be a true copy from the
Minutes of said Superior Court. This Feby 21, 1968

/s/ RALPH W. GOLUCKE
Clerk Superior Court
Taliaferro County, Ga.

Affidavit of Ralph W. Golucke

STATE OF GEORGIA

COUNTY OF TALIAFERRO

Personally appeared Ralph W. Golucke who, after being duly sworn, did depose and state that he is and has for 57 years been clerk of the Superior Court, Taliaferro County, Georgia. On February 8, 1968, he was present in the Superior Courtroom of Taliaferro County, together with Honorable Robert L. Stevens, Judge of the Superior Court of Taliaferro County, Honorable M. B. Moore, Sheriff of Taliaferro County and Harold F. Richards attorney of Taliaferro County. The Sheriff announced to all persons present that the Superior Court of Taliaferro County was then in session. The sealed grand jury box was delivered by him as clerk to the Judge of the Superior Court. He saw Judge Stevens break the seal on the grand jury box, saw the Judge unlock the box and watched the Judge draw names from the grand jury box. As each name was drawn by the Judge, the name was shown to deponent and to the Sheriff and the names, in the order drawn, were placed by deponent on the attached list entitled Taliaferro Superior Court Grand Jurors.

Prior to the time that the Grand Jury was impaneled, Judge Stevens excused the following persons: Mrs. F. G. Mitchell, Jr., J. S. Callaway, B. R. Darden, Marvin H. Rhodes and Mrs. Madison Taylor. By each of their names I put "Ex RLS" to indicate excuse prior to court. At the time that court convened, Judge Stephens in open court excused Grand Jurors Toomie Lewis, Mrs. Lois Tuggle,

Mrs. Mary Bates and Willie J. Hughes. I wrote "Ex" by each of their names to so indicate. Of the names that were thereafter left on the Grand Jury list, the first twenty three were selected and impaneled as the Grand Jury of Taliaferro County for the February 1968 term.

This 11 day of March, 1968.

RALPH W. GOLUCKE

(Sworn to March 11, 1968.)

LIST OF GRAND JURORS ANNEXED TO AFFIDAVIT OF RALPH W. GOLUCKE

TALIAFERRO

Superior Court.

GRAND JURORS

SPECIAL FEBRUARY

Term. 19 68, by

Robert L. Stevens
in the Superior Court Room of said County, in open Court. Judge of said Court.
on 8th day of February, 19 68

GRAND JURORS.

- | | | |
|--|--|---------------------|
| 1 Rev. Garnett M. Moore | 14 Miles Hackney | 31 Mrs. Mary Bates |
| 2 Willie George Edwards | 15 George Williams Jr | 32 Willie V. Hughes |
| 3 Mr. F. J. Mitchell Jr. Ex RLS | 16 Mr. Darden Ex RLS | |
| 4 Bulous Dotson Jr | 16 H. G. Moore Jr. | |
| 5 Wellie Ware | 17 Marvin H. Rhodes Ex RLS | |
| 6 Mrs. Pat Pate | 17 M. M. Wheeler | |
| 7 Charles V. Schuff | 18 G. P. Stewart | |
| 8 George A. Pambrrough | 18 Owens V. Lunceford | |
| 9 Mrs. Shirley Noggle | 24 K. W. Dye | |
| 10 W. R. Rhodes Jr | 25 Mrs. Gertrude Hatney | |
| 11 Jac't Sturdivant | 26 Otis Simons | |
| 12 Thompson S. Chew | 27 Charles W. Greene | |
| 13 J. S. Galloway Ex RLS | 28 Toomie Lewis | |
| 14 Horace C. Rhodes | 29 Mrs. Lois Tugale | |
| 15 Nathaniel Mapp | 30 Mrs. Madison Taylor Ex RLS | |

TRAVERSE JURORS—FIRST WEEK.

- | | |
|----|----|
| 1 | 25 |
| 2 | 26 |
| 3 | 27 |
| 4 | 28 |
| 5 | 29 |
| 6 | 30 |
| 7 | 31 |
| 8 | 32 |
| 9 | 33 |
| 10 | 34 |
| 11 | 35 |
| 12 | 36 |
| 13 | 37 |
| 14 | 38 |
| 15 | 39 |
| 16 | 40 |
| 17 | 41 |
| 18 | 42 |
| 19 | 43 |
| 20 | 44 |
| 21 | 45 |
- Robert L. Stevens*
J. S. C. T. C.

**List of Grand Jurors Annexed to Affidavit of
Ralph W. Golucke**

| | |
|----|----|
| 2 | 26 |
| 3 | 27 |
| 4 | 28 |
| 5 | 29 |
| 6 | 30 |
| 7 | 31 |
| 8 | 32 |
| 9 | 33 |
| 10 | 34 |
| 11 | 35 |
| 12 | 36 |
| 13 | 37 |
| 14 | 38 |
| 15 | 39 |
| 16 | 40 |
| 17 | 41 |
| 18 | 42 |
| 19 | 43 |
| 20 | 44 |
| 21 | 45 |
| 22 | 46 |
| 23 | 47 |
| 24 | 48 |

Georgia, Taliaferro County

To the Sheriff of said County:

You are hereby commanded to summon the persons whose names appear in the foregoing Panels, to be and appear at the Superior Court, to be held in and for said County, on the 16th day of February, 1968 next, at 10 o'clock A. M. of that day, to serve as Grand ~~RECEIVED~~ Jurors at the Special Feb Term, 1968, of said Court, they having been duly drawn according to law, and have you then and there this precept, with your return thereon as to how you have executed the same. Merwin fall not.

Witness the Honorable Robert L. Stevens Judge of said Court, this 8th

day of February, 19 68

Ralph W. Golucke Clerk

Taliaferro Superior Court.
Drawn for
February Special Term, 19 68
VENIRE FACIAS

LIST OF GRAND JURORS DRAWN TO
SERVE FEBRUARY SPECIAL
TERM, Feb. 16, 1968

Georgia, Taliaferro County
Filed for record this 8th day
of February, 1968 at M.
Ralph W. Golucke
Clerk Superior Court

GEORGIA, TALIAFERRO COUNTY
Record & Minutes Page 1568
Filed by Ralph W. Golucke
Clerk Superior Court

Report to the Court in Behalf of Defendant Jury Commissioners

On February 23, 1968, based upon information furnished by defendant Jury Commissioners, defendants' attorney Charles J. Bloch submitted a report to the court of the revision of the Traverse and Grand Jury lists of Taliaferro County in response to the January 26, 1968, order of Honorable Robert L. Stevens, Judge of the Superior Court of Taliaferro County. During the hearing of this case on that same date the court asked additional questions about the revision of the Traverse and Grand Jury lists. That additional information as furnished to defendants' attorneys, and as in some respects corrected, is as follows:

The Jury Commissioners of Taliaferro County met beginning Monday, January 29, 1968. They had for their consideration the 1966 list of qualified voters of Taliaferro County, a copy of which is attached as Exhibit A, which contains 2,252 names instead of 2,152 names as previously reported. In the manner already reported each and every name on the voters list was considered and the following numbers of names were eliminated without regard to race for the following reasons:

| | |
|--|--------------|
| Under 21 years of age | 81 |
| Dead | 94 |
| Persons who requested to be eliminated from consideration | 43 |
| Persons about whom information could not be obtained | 226 |
| Persons who were rejected for the following principal reasons: | |
| (a) Poor health and/or old age | 482 |
| (b) Away from the county most of the time | 533 |
| (c) Miscellaneous | 179 |
| (d) Elected officials and then known dupli- cations | 8 |
| TOTAL NUMBER ELIMINATED | 1,646 |

Six hundred and six names remained. Since 606 names are more than the Jury Commissioners deemed to be needed in the traverse jury box, they arranged the remaining names in alphabetical order using slips of paper which, in some instances, showed the names of husbands and wives on the same slip. The Jury Commissioners took every other name alternately and ended up placing 304 names on the traverse jury list. They do not know how they got 304 instead of 303 names. Attached as Exhibit B is the traverse jury list. From the names on the traverse jury list, 121 names were drawn by lot and put on the grand jury list, a copy of which is attached as Exhibit C.

After the February 23, 1968, hearing, the Jury Commissioners re-examined and looked at the said registered voters list and prepared, to the best of their recollection, a typewritten list of each and every category of eliminated names as herein recited and to the best of their knowledge

put a dot to the left of the name of each person who is a member of the negro race. Those lists are attached and they show:

| Exhibit | Category | Total Number of Names | Negro Names |
|---------|--|--------------------------|----------------|
| D | Under 21 | 81 | 71 |
| E | Dead | 94 | Unknown |
| F | Requested | 43 | 2 |
| G | No Information | 226 | Unknown |
| H | Poor health and/or old age .. | 482 | 191 |
| I | Away | 533 | 263 |
| J | Miscellaneous | 179 | 167 • |
| K | Elected Officials and then Known Duplications | 8 | —0— |
| L | Not Alternately Selected | 302 | 106 |

After the February 23, 1968, hearing, defendants also put a dash by the side of each name on the traverse and grand jury lists that to the best of their knowledge and belief is the name of a person of the negro race. Those marks are on Exhibits A and B.

Respectfully submitted,

WILBUR D. OWENS, JR.,
Of Counsel for Defendants

Responsive Pleading of Remaining Defendants

Defendants W. W. Fouche, Rastus Durham and Elmo Bacon were previously stricken and dismissed as defendants. The remaining defendants subject to all motions, objections and pleadings heretofore filed and otherwise made, file these their responsive pleadings:

DEFENSES

Every defense made by motion, pleading, objection or otherwise is incorporated herein by reference the same as if fully stated herein.

ANSWER

1.

Answering paragraph I, defendants admit all but the last sentence of A, 1 and 2 and that sentence they deny. Because of the dismissal of defendants Fouche, Durham and Bacon an answer to B, 3 is not required. Answering B, 4 defendants admit only that defendants Chapman and Fambrough are white Taliaferro County, Georgia citizens elected as provided by law as members and serving as members of the Taliaferro County Board of Education; further answering defendants state that W. A. Drinkard is deceased and defendants Jones and Williams were not members of the said board of education at the time this complaint was filed; the remainder is denied. Answering B, 5 defendants admit all but the last sentence and that is denied.

2.

Answering II defendants deny paragraphs 6 and 7.

3.

Answering III defendants deny paragraphs 8, 9, 10 and 11; deny the first sentence of paragraph 12 and admit the remainder of said paragraph; for want of information neither admit nor deny paragraphs 13, 14, 15 and 16; and deny paragraphs 17, 18, 19 and 20.

4.

Defendants demand a trial by jury.

5.

Defendants particularly demand a trial by jury as to the issue made by this responsive pleading and the averments of paragraphs 18 and 20 of the complaint.

6.

If Title 28, Section 2281 of the United States Code and Title 28, §2284 of the United States Code are construed to permit a plaintiff or plaintiffs to procure ancillary damages or monetary damages of any nature without a trial by jury, then defendants aver that those sections are violative of the Seventh Amendment to the Constitution of the United States which provides: "In suits at common law, where the value in controversy shall exceed \$20.00, the right of trial by jury shall be preserved, and no fact tried by a

jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law," for that any action for the recovery of monetary damages by whatever name called is an action "at common law" within the meaning of the aforesaid Seventh Amendment to the Constitution of the United States.

WHEREFORE, defendants pray that the plaintiffs have nothing and that all costs be taxed against plaintiffs.

Transcript of Proceedings**(January 23, 1968)**

[2] Judge Bell: Before we take up the case of Turner vs. Fouche and others, Civil Action No. 1357, I will ask if there are any motions from the Gentlemen of the Bar. I had some notice, or a letter, I believe it was, that somebody was going to make a motion in the case of Bennett vs. Evans.

[7] Judge Bell: All right, now, we will take up Turner against Fouche. The first thing we will do, on the motion of the State to intervene under Rule 24(b) on the basis they have an interest in the constitutionality of their own statutes and they want to defend them, and that will be granted Mr. Evans. You can prepare an order allowing your intervention, you being made a party defendant, you are intervening as a party defendant.

Now, Mr. Bloch, we have really three motions, although one of them is split up—there are more than that because we [8] have got many different defendants, but one is to dissolve the Three Judge Court. One is a motion to dismiss, I believe, and one is to be more specific, and I have forgotten what the other is. Let me say this: We want to get the facts stipulated today. We are not only going to hear the motions, but we are going to sorta conduct a pre-trial conference and get all the facts stipulated. Do you think it would be more orderly to argue your motions first? I suppose it would be because you have a right actually to have these motions argued first.

Mr. Bloch: I have no preference, Your Honor, whichever way the Court prefers. If you want to stipulate the

facts and have the things argued together, or if you want to take up the motions first it's all right with us. We have no preference. It is a matter for the Court to determine.

Judge Bell: What do you say, Mr. Moore?

Mr. Moore: Your Honor, we think it will be better to hear the evidence. We don't think it is going to take more than about an hour to hear the evidence. We have made pretrial discovery, and we are going to offer—

Judge Bell: Well, it maybe you won't have any evidence after we stipulate the facts.

Mr. Moore: Well, perhaps so, and I would estimate that we would need perhaps fifteen or twenty minutes to put on the testimony.

Judge Bell: Well, if you are going to put on testimony [9] Mr. Bloch has a right to argue his motions first. We had better hear the motions first then.

Mr. Moore: Yes, sir.

Judge Bell: Are you going to argue, Mr. Bloch, or is Mr. Owens going to do the arguing?

Mr. Bloch: I am going to start off.

Judge Scarlett: Have you changed your mind, Charlie?

Mr. Bloch: I couldn't hear you, Judge.

Judge Scarlett: You told me that you were going to let Owens argue it.

Mr. Bloch: I told you that I was going to start off and then let him bat.

Judge Bell: All right, suppose you go right ahead.

Mr. Bloch: If the Court please, as Judge Bell indicated in his statement awhile ago, there are motions pending.

Judge Bell: Mr. Marshal, is there a lectern around here somewhere that he can rest his papers on?

The Marshal: I don't believe so, Judge.

Judge Bell: Would it help you, Mr. Bloch, if you used part of the clerk's desk there?

Mr. Bloch: Thank you, that would help very much.

Judge Bell: All right.

Mr. Bloch: As to the motions which we have filed are those stated by Your Honor earlier, and the one that was omitted [10] in the statement, I think, was a motion under Rule 12(b)(1) and 12(b)(2) and the motion with respect to whether this is in reality in law a class action.

Judge Bell: A class action, that's right.

Mr. Bloch: That's the other one. Now, sometime ago, two or three weeks ago, counsel for the defendants had an official notice from the Clerk that the Court desired that a memorandae be filed in support of the motion and we assume served on the other side.

Judge Bell: Yes.

Mr. Bloch: So those memorandae were filed sometime ago, a couple of weeks ago, ten days or so ago and a copy sent to opposing counsel immediately.

Judge Bell: The memorandae were received.

Mr. Bloch: Now, we have not received anything from opposing counsel.

Judge Bell: I thought I saw him hand a batch of papers up here this morning.

Mr. Bloch: I was going to say until about five minutes ago, there was filed and served upon us a document called "Trial Brief", I think it is, "Plaintiff's Trial Brief", which I have not had an opportunity to even read much less to seek to reply to; but I have no desire to argue extensively the motions which have been filed. I have no desire to be talking just to be talking, when it has been covered fully, I think, by the memorandum which has been submitted to the Court.

[11] Judge Bell: Well, I think you would be justified in relying on your brief. We have read the brief.

Mr. Bloch: With that I have no desire to argue it extensively, but of course if he argues responsively—

Judge Bell: —I think probably Mr. Moore wants to respond to the brief, particularly in view of the fact we have not had an opportunity to read his brief, he will probably want to respond. You can rest on your brief, if you want to.

Mr. Bloch: I will do that.

Judge Bell: All right. Mr. Moore, do you want to say something, or you Mr. Owens?

Mr. Owens: I will wait until later.

Judge Bell: All right, Mr. Moore, who is leading counsel on your side?

Mr. Moore: I am.

Judge Bell: All right, do you want to be heard on this.

Mr. Moore: Your Honor, I would like to say—

Judge Bell: —Do you want to come up here where we can hear you better?

Mr. Moore: The facts of his motion to dissolve the Three Judge Court because it is jurisdictional in nature, I would like to make the following observation: The complaint does state a substantial federal question as to the constitutional validity of these statutes, these various statutes.

[12] Judge Bell: On what ground?

Mr. Moore: Upon the grounds, one, that they discriminate against these petitioners in that they deny them equal protection and due process.

Judge Bell: How does the statutes do it? Let me say this to you, give you fair warning. You know we have dissolved two or three Three Judge Courts in Atlanta recently on In Re: Branford, not on the application,

unconstitutional application, but because all that was complained of was the unconstitutional result. Now, see if you can distinguish this situation from an unconstitutional result.

Mr. Moore: Your Honor, without arguing the—

Judge Bell: —Just see if you can distinguish the two.

Mr. Moore: Well, Your Honor, I would like to say that the easiest statute on which to draw in support of the exercise of the jurisdiction of the Court is the statute providing for the qualification of the school board members, particularly the freeholder provision. It is our contention that that is a denial of equal protection and due process because it sets a property qualification for office holders as such and has the effect of sifting out a great majority of the constituency and insuring in effect that Negroes will not be put on the board, elected to the board of education. We have briefed that extensively in our brief. The only question—

Judge Bell: Well, don't you think we will have to [13] have some evidence on whether or not that does actually pinch out anybody? I think there are a great number of Negro freeholders in Taliaferro County.

Mr. Moore: Yes, sir, and we can abide by the admissions which are already in evidence that they have never served on the Board of Education.

Judge Bell: I know, but do you know how many Negro freeholders there are in Taliaferro County?

Mr. Moore: We will put up some evidence on that.

Judge Bell: You see, if there were none there would be some substance to what you say, but the question would be whether or not a freeholder qualification is a reasonable qualification.

Mr. Moore: Well, we have demonstrated in our brief that it is not a reasonable qualification. We don't have to be right in that contention, Your Honor. The only thing is that the contention has to be a substantial one.

Judge Bell: To keep a Three Judge Court.

Mr. Moore: And certainly it is not obviously trivial.

Judge Bell: Right.

Mr. Moore: And certainly there is no precedent saying that there is no merit to the claim.

Judge Bell: All right, other than the freeholder point, what other points would you have that would support keeping a Three Judge Court?

[14] Mr. Moore: Well, there is no objective criteria for the qualifications of board members. Take for example—

Judge Bell: Well, I don't think there is anything to that. You see, if we had objective criteria you would complain that they had pinched people out. The best thing you can do now to make a law stand up is to say nothing, just to say to appoint eight people, or something like that, otherwise ever statute is now is under attach some way another.

Mr. Moore: Yes, sir, and there is a reason for that, because we are now entering a period—

Judge Bell: —The only reason I can see is to finally break the Government down and nobody can be appointed to anything.

Mr. Moore: No, sir, it's not that, Your Honor. We are entering a period of more egalitarian society, and the laws, most of the laws, with which we enter that period were made in a different historical epoch.

Judge Bell: Which will put children on the school board?

Mr. Moore: I wouldn't—

Judge Bell: —Didn't they try to turn France over to the children to run?

Mr. Moore: I wouldn't want to answer that, Your Honor, as to turning it over to the children to run. The only thing I would make in response to that is this: If children are known to run the school board, if children alone ran France, that would be a question as to whether or not the country or the [15] school board is being run by a true cross section of the community.

Judge Bell: Well, we are not going to get into anything like that. You are not going to get us to rule that children have a right to be on the school board or anything like that. As far as I know the best people, the most responsible people, ought to be running the school board and running the Government.

Mr. Moore: Well, Your Honor, we have a serious question in Taliaferro County as to who is; more responsible people.

Judge Bell: That's right.

Mr. Moore: And, historically, the most responsible people under the statute which resulted in the election of the school board members have been white, and there doesn't seem any other way that you can construe these statutes except to say that the qualifications mean White. When they said "intelligently and upright", they mean white.

Judge Bell: Well, you know that in the south for many years that this was the system but we have had a change in time and a lot of offices have not yet been held by Negro citizens, but there are a lot of offices to which they are now moving into, and it is too simpler argument to say "Well, they have never had any Negroes on the school board". Well, we know that. Everybody knows that. There never has been one in the history of Taliaferro

County I don't imagine unless it was during the Reconstruction. You got to figure it on Reconstruction, they may have had some then. No, they didn't have a school board then.

[16] Mr. Moore: All I know about Reconstruction, Your Honor, is this: That in the very same year that they enacted these statutes, 1868, was the very same year that they kicked out all of the Negro members of the Georgia State Legislature.

Judge Bell: Right.

Mr. Moore: And when they enacted these statutes providing for intelligent and upright citizens—and systematically since 1868 Negroes have been excluded in every aspect of public life in Taliaferro County.

Judge Bell: Right. Well, everybody will stipulate that.

Mr. Moore: Yes, sir, we have proved that, and we think that when you read these statutes realistically and you figure them against the historical context in which they have been operated that these statutes dictate and mandate one thing alone and that is "White Supremacy", white leadership and control of the government, the school board and every aspect of public life in the county, and we think the statutes are of that type, Your Honor.

Judge Bell: Well, you see, you can prove that about any statute, because you see this business of just always showing that the south is always wrong about everything in the future because of what they done in the past is going to have to stop somewhere along the line. Now, you can show on any statute in the books for a hundred years that no Negroes have held an office. They haven't been governor, haven't been on the Public Service [17] Commission, Highway Board, or anything you want to show,

you can make this same; argument, you would knock out every statute.

Mr. Moore: Well, Your Honor, I understand the feeling that the Court has for the regional aspect of what has been the attack heretofore against these practices—

Judge Bell: —The Court is trying to get this thing straighten out for the future than all of this about the past.

Mr. Moore: The reason that it has been a regional attack is because the south has been the area where these practices have been the most extensive, and most intense, and most oppressive, however, now a new vision is opening up and almost the same attack can be made throughout the country. The country is truly becoming national as to discrimination. It has a national character.

Judge Bell: Weren't you the lawyer in the draft board case not long ago where the Justice Department was arguing against you because they found out that they didn't have any Negroes on the draft boards in the north either.

Mr. Moore: Yes, sir, but I don't think that invalidates it because they didn't have any in the north. There is an interesting book on it, Your Honor, if you would like to look at it sometime. It is called "North of Slavery", by a fellow named "Libwak". We didn't cite it in our brief. Where he points out how national slavery is, or slave practices is, how bad it is in the north and in state governments and in the federal government particularly, [18] how Negroes were systematically excluded from the national life pursuant to statutes, and this is a very interesting book. Now, we do cite one book in our brief, Your Honor, and apparently the secretary omitted to give the name of the book.

Judge Bell: What page are you talking about?

Mr. Moore: It is page 25—24 and 25. There is an extensive quotation at the bottom of page 24 and continuing to page 25. That quotation is from Elkins Slavery.

Judge Bell: E L K I N S?

Mr. Moore: The University of Chicago Press, Your Honor. I think it is footnote 64 in Elkins' book.

Judge Bell: All right. Well, now, you are talking to some judges that understand all about the south and about the Reconstruction and all of that, but here is what I want to ask you, lets get down to this case: Now, your main complaint, I take it is that there are no Negroes on the school board.

Mr. Moore: That's right.

Judge Bell: That is the number one complaint.

Mr. Moore: Yes, sir, and there is a reason for it. There is a reason for that. It is a constitutional and statutory scheme.

Judge Bell: Well, I don't know about that. Let's don't get into the reasons. I am trying to find out what your complaint is about. You are complaining because there are no Negroes on the school board.

[19] Mr. Moore: Yes, sir.

Judge Bell: Number one. Then your subsidiary complaint is that the jury list is so composed that you can't get enough Negroes on the grand jury to get anybody appointed to the school board.

Mr. Moore: Yes, sir.

Judge Bell: So, the reason you are attacking the jury list really is because you are attacking the school board.

Mr. Moore: A part of the scheme and we have to attack it.

Judge Bell: Have to attack the entire school board.

Mr. Moore: Yes, sir.

Judge Bell: Now, the third thing, and this I do not understand, why do you have the traverse jurors in the case?

Mr. Moore: Your Honor, because that is a statute that the grand jury has to be selected from the traverse jury, and they take—

Judge Bell: —I know, but why would you sue the traverse jurors individually? That would be like selecting five citizens from Peachtree Street as representing some class.

Mr. Moore: We do this under Rule 23, and we also do it under some decisions of the Fifth Circuit, which have permitted class suits to be brought against a defendant as representative of a class—

Judge Bell: Well, suppose you picked me out to sue [20] because I was a traverse juror?

Mr. Moore: The reason for that, Your Honor—

Judge Bell: —What could I give you? What relief could you get from me?

Mr. Moore: Well, the thing about that is if this particular individual actually represents a class, then the class would be bound by the judgment and an injunction would run against a class.

Judge Bell: Yes, but you know that no traverse juror represents all the jurors in a county.

Mr. Moore: The fact that he is a member of a class because he is a traverse juror. He is representative of that class. The test is whether or not his representative is adequate. Certainly the court would not want us to name some three hundred odd individuals as defendants in order to bring them all to court.

Judge Bell: Well, if you did we would strike all that part of the complaint because I don't see how it has a thing in the world to do with your case.

Mr. Moore: But we are actually, Your Honor, the class of grand jurors, which is the smaller class. The traverse jury is implicated because of the fact the grand jurors are taken from the traverse jury list.

Judge Bell: Wait a minute now.

Judge Morgan: Who are you claiming your damages from?

Mr. Moore: Your Honor, we think that on that score we [21] would obtain the damages from all of the defendants.

Judge Bell: Including the traverse jurors, just anybody who happened to be put on the jury you want to get damages from?

Mr. Moore: Your Honor, that would be left up to the court in its sound and equitable discretion as to on whom you would put the damages.

Judge Bell: In paragraph 3 you say that Fouche, Durham, and Bacon, are white citizens of Taliaferro County. They are registered voters and Members of the Grand and Traverse Juries of Taliaferro County. They are sued individually, and in their capacities as Grand Jurors of Taliaferro County. What is it you claim they have done?

Mr. Moore: They participated. They are necessary to be before the Court because they can insure the adequacy representation of the grand jurors in that county.

Judge Bell: You think we could just seize the Grand Jury and tell them what to do just by virtue of these folk being defendants, tell the Grand Jury to meet and elect somebody?

Mr. Moore: They are sued as a class, as representative of a class, Your Honor.

Judge Bell: I just don't see what the Grand Jury—the Grand Jury is a changing thing. It changes every term of court.

Mr. Moore: It would be against them and their successors in office as Grand Jurors.

[22] Judge Bell: Well, I see how you can sue the school board on the theory you say they have cut off the funds and have stopped running the school buses and that sort of thing, and then I see how you could sue the Jury Commissioners on the theory that they have not composed a fair jury list, but it is hard for me to see how you can sue Grand Jurors.

Mr. Moore: It is the Grand Juries as a class who are the electors. They are the electors of the school board members.

Judge Bell: Why don't you just sue three registered voters then?

Mr. Moore: No, sir because the—

Judge Bell: —And get damages from every voter in Taliaferro County and that would include more Negroes than White?

Mr. Moore: That's interesting, Your Honor, but the thing about it is the electorate for obtaining school board members, is the Grand Jury. The Grand Jury, under statute, is mandated to elect the school board members.

Judge Bell: I don't see how that is any entity. That's not like suing members of an unincorporated association, for example. Grand Jurors are transient. They are just a group selected at one term of court and another group at

another term of court. What connection—I bet they don't even have a Grand Jurors Association.

Mr. Moore: Well, Your Honor, it is in this connection [23] in that the Grand Jurors are an identifiable class. They are persons who are appointed by the Jury Commissioners from time to time to serve in that office, and as a class it is identifiable with respect to office holders, it is identifiable with respect to function. This would allow several of their members to be sued as representatives of that class, since it is an identifiable class, it is not speculative, it is not vague, it is not an indefinite type of class, and that the injunction would run against the present body of Grand Jurors, as a class, and their successors in office.

Judge Bell: Well, are these three men presently Grand Jurors?

Mr. Moore: Yes, sir.

Judge Morgan: How long does the Grand Jury serve under the Georgia law?

Mr. Moore: I think they can serve at least two years, if not more.

Judge Morgan: Doesn't the average Grand Juror serve at the term of court and then serve until the next term of court, whenever that might be?

Mr. Moore: That is the usual practice, I think, Your Honor.

Judge Morgan: I presume that every superior court meets at least twice a year, don't it?

Mr. Moore: Yes, sir.

[24] Judge Morgan: So, he would only serve for six months.

Mr. Moore: Well, Your Honor, you see the grand jury list is revised every—

Judge Morgan: —He is no longer serving as one of those 23 Grand Jurors—he only serves until the next term of court.

Mr. Moore: Yes, sir, but he is a member a class of Grand Jurors during the two year period that he is on the grand jury list.

Judge Bell: What you mean is he is on the roll?

Mr. Moore: Yes sir.

Judge Bell: He is one of those two fifths of the Jurors who are drawn to begin with?

Mr. Moore: That's right, sir.

Judge Bell: And you want to make all of them defendants?

Mr. Moore: Yes, sir.

Judge Bell: Whether they have ever been a Grand Juror or not, you want to put them under an injunction and make them pay damages?

Mr. Moore: That would be a discretionary matter with the court.

Judge Bell: Well, I don't believe you are going to get very far with that.

Mr. Moore: Well, Your Honor—

Judge Morgan: How does the two fifths know that he is [25] a member of the Grand Jury?

Judge Bell: He doesn't know it, and there is no way in the world for him to know it.

Mr. Moore: Well, Your Honor, his name is in the box.

Judge Morgan: He wouldn't know that his name was in the box, unless he was drawn, would he?

Judge Bell: I tell you one thing, if you prevail in this kind of an argument you would have a mass exodus from Grand Juries all over this state. Everybody would get off.

Mr. Moore: A Grand Juror? All he would have to do is to go to the court house.

Judge Morgan: You would have to make inquiry as to whether your name was on the Grand Jury?

Mr. Moore: If you had not been summonsed, you might.

Judge Morgan: Does the law provide for it to be published now?

Mr. Moore: I don't think so.

Judge Bell: Well, somebody said that the difference between tweedledee and tweedledum was to have somebody in charge of the tweedle, or some sort story as that. That's what we are doing now, so lets get onto something else.

Mr. Moore: Your Honor, we will just close out with this observation: If the person we have sued is adequate to give notice to the other Grand Jurors to come in and defend, I would think that we have made out a pretty good class action against them, against the Grand Jurors as a class.

[26] Judge Bell: What's the nearest case you have in point in suing three people that represent such a body as a Grand Jury? Have you got a Grand Jury case?

Mr. Moore: One case is pending in the Fifth Circuit now. "Bouchcheck" (Spelling not certain) against somebody from Greene County. It has not been decided, where the Grand Jury was sued as a class, a civil action, suing to enjoin a prosecution and the Grand Jurors are named, or sued as a class, class representative and that's pending in the Fifth Circuit.

Judge Bell: Greene County, Georgia, or Alabama?

Mr. Moore: Greene County, Alabama, Your Honor.

Judge Bell: All right.

Mr. Moore: And a stay order was issued by the Fifth Circuit.

Judge Bell: Well, I tell you, if this was the ~~strongest~~ part of your case you wouldn't be here long, but you have got more meritorious theories than this.

Mr. Moore: Your Honor, under the analysis of class, an identifying class, that was spelled out in Fernandez against Texas, which we do not cite in our brief, I think that there is a definite class and that the proper test under Calhoun against Callodays, a Fifth Circuit case, involving an unincorporated association which is a distinction—

Judge Bell: —I was on that panel.

Mr. Moore: —that we have made out a case suing as a class, Your Honor.

[27] Judge Bell: Suing the Grand Jurors?

Mr. Moore: Yes, sir.

Judge Bell: Now, under the second thing, what right does a Three Judge District Court have to award damages in the event these people ask for a jury trial?

Mr. Moore: Now, they wouldn't be entitled to a jury trial.

Judge Bell: You mean just take the money away from them without giving them a jury trial?

Mr. Moore: Yes, sir, because this is an exercise of historical equity power.

Judge Bell: To take damages?

Mr. Moore: To enter ancillary damages, an ancillary award of money. The equity courts have done this since time immemorial to make the parties whole and the amount of damages is something left solely to the discretion of the court.

Judge Bell: Would you give Mr. Turner the half million dollars, or would you divide it among some of his friends?

Mr. Moore: Your Honor, in our brief we conclude with what we think would be a proper disposition of the funds, that the funds would be paid to a Receiver or Special Master who would use those funds to equalize educational opportunities by giving the people of Taliaferro County a remedial program, remedial educational program and manpower training program so they can acquire skill and sorta compensate them.

[28] Judge Bell: Who would pay the half a million dollars, the white citizens or all citizens?

Mr. Moore: It would be apportioned among the citizens who have been members of the class of wrongdoers.

Judge Bell: Every one who has ever been a Grand Juror would have to put up something?

Mr. Moore: It might turn out that way.

Judge Bell: I see.

Mr. Moore: That is a question that is left to the sound discretion of the Court. We think that as a principle of equity and principle of law the Court does have jurisdiction to give it, but whether or not in the exercise of discretion the Court would do it is a different matter.

Judge Bell: I don't see why you want to clutter up your case. You have got a case resting on these facts, that there are no white children in school, so it is an all Negro school with an all white school board.

Mr. Moore: Yes, sir.

Judge Bell: And they have stopped running buses.

Mr. Moore: Well, they say they are running buses.

Judge Bell: Well, wait a minute. That's what you say. Now, in your petition you say that they have done away with the school buses, that they have cut down on the school

books and various other things and all of this and it became an all Negro system. That's your complaint. That's your basic complaint. Now, [29] lets get onto that.

Mr. Moore: Your Honor, the basic thing about that is the defendants have permitted an exodus of white children from the—

Judge Bell: —You don't think the freedom of movement has been stopped or should be stopped in this country, do you?

Mr. Moore: No, sir. Let me finish, Your Honor.

Judge Bell: All right.

Mr. Moore: They have permitted an exodus of white children from the county and they have done nothing to encourage the children, the white children, to stay and study in the county, and as a result the plaintiffs are certainly hurt because they are without contact with whom they certainly have adult experiences they don't have at school, school life experience, and—

Judge Bell: —Do you have any suggestion about how they would go about getting some white children in the school other than using some sort—

Mr. Moore: —Excuse me, Your Honor. I think if the school board had people on there of good will, for the want of a better term, that they would encourage, exploiting governmental programs in the county that would lead to a rigid school system and a rigid curriculum.

Judge Bell: You mean beg the whites to return.

Mr. Moore: Yes, sir, and make the school attractive to [30] all the people, because it certainly couldn't be a desirable thing to transfer your kids to an adjoining county. That's an imposition of time, if nothing else.

Judge Bell: Well, they are not supposed to be doing that.

Mr. Moore: Well, the private parents do it.

Judge Bell: We had that out before when we were over here, that if the adjoining counties took any white children from Taliaferro County they had to take the Negro school children.

Mr. Moore: Well, they are receiving white children now. As a matter of fact the school board members themselves are sending their children over to white counties. We have got one school board member who sends his kid up to Jonesboro—in Jones County.

Judge Bell: Gray, Georgia?

Mr. Moore: I think so, and another one sends his kids over to Greensboro in Greene County. He has three kids going over there.

Judge Bell: What does he do, pay tuition?

Mr. Moore: I don't know what the arrangement is, Your Honor.

Judge Bell: Well, then Greene County would have to take all the Negro children who want to go over there, if they are taking whites. We had that out before. Is that going to get back into the case again?

Mr. Moore: No, sir. We would just like to say this: If [31] democracy is the creed for the elector process in Taliaferro County for the election of school board members, the plaintiffs are confident that the school system will become so enrich that all the citizens of the county would want to go to school in that county.

Judge Bell: All right. Now, lets get down to the school board. Is it true that there are three vacancies?

Mr. Moore: I think that's right.

Judge Bell: Three vacancies. How would you imagine the Court could go about getting some Negroes on the school

board through the Grand Jury, assuming that is the only way you can get anybody on the school board.

Mr. Moore: First, we would have to make another legal assumption, and that legal assumption would be that the court would consider the petition as raising a substantial question which it will postpone for a decision and then look at the facts and issue an injunction running against the illegal administration of the statutes.

Judge Bell: I know, but suppose we just issue an injunction that wouldn't accomplish anything.

Mr. Moore: Yes, sir. Well, you have to do at least two things. One, you have to enjoin the inforcement of the statutes and, two, you would have to appoint a receiver in the interim to run the schools with the aid of an interim committee of parents.

[32] Judge Bell: Where are you going to find a receiver?

Mr. Moore: Well, we found one last time, Your Honor.

Judge Bell: Yes, but that is complete imposition on the State School Superintendent to make him run one county.

Mr. Moore: It maybe an inconvenience but inconvenience is required in order to inforce the constitution, and we can't weigh the relative inconvenience to parties and let constitutional rights go down the water shed. Certainly there is an inconvenience. I wouldn't deny that.

Judge Bell: Well, the question is whether it is unconstitutional not to have Negroes on the school board. But just on the basis of fairness it certainly seems like there ought to be some Negroes on the school board. I don't know about the constitutional question.

Mr. Moore: Your Honor, I don't think I could stand here and say that you have got to have Negroes on the school board. I don't that I can legally argue that point,

but I think I can argue the other point, and that point is that they can't be fenced out of the—

Judge Bell: That's right, you can't have a system that excludes Negroes.

Mr. Moore: Yes, sir, and the effect of this system excludes them, that is, that they do not have an opportunity of getting on the school board. That's the difference.

Judge Bell: Suppose they elected the school board [33] members and Negroes ran for office and they were all defeated? You couldn't say anything about that.

Mr. Moore: Well, I don't know, Your Honor. They had an election over there the last time, not for the school board, but for county commissioners and a couple of offices and the Negroes didn't win out, and there were reasons for that.

Judge Bell: They split?

Mr. Moore: Well, that was one factor and the other factors were that they were harassed and oppressed and the precincts were so arranged that it made it uncomfortable for the people to come in and vote.

Judge Bell: Well, you know you could get the Justice Department and they would send a hundred people in there to watch over—shepherd the situation, if you made a complaint.

Mr. Moore: Yes, sir. Your Honor, they can watch all they want to, but sometimes you have to prod to get the sheep in line and the Justice Department doesn't seem to be prodding them. They watch a lot. They have their eyes on this situation, but I don't think they are prepared to do anything about it.

Judge Bell: Well, now, lets return to the evidence. Rather than putting on witnesses right now, what would

your proffer be? We are treating this hearing as sort of a pretrial conference.

Mr. Moore: Yes, sir. Your Honor, the first thing that [34] we would proffer is a certified copy of the Grand Jury list.

Judge Bell: Wait a minute now. A proffer is what you expect to prove.

Mr. Moore: Yes, sir.

Judge Bell: Now, you are moving away from a proffer and you are offering evidence.

Mr. Moore: Well, Your Honor—

Judge Bell: —Here is what I had in mind; I thought you might state, make a proffer that you could prove—just state what I would expect to prove.

Mr. Moore: Yes, sir.

Judge Bell: And then it maybe that Mr. Bloch and Mr. Evans will say “Well, we will agree to that. We will stipulate that those will be the facts.” Now, I don’t know whether you are prepared to do that right now. It maybe that you will need a few minutes to think it over. Mr. Evans what do you think about that procedure?

Mr. Evans: Well, Your Honor, of course, our interest is purely the facial constitutionality of the statutes. I believe that would be up to Mr. Bloch.

Judge Bell: All right, sir. I will hear from Mr. Bloch on this.

Mr. Bloch: If Your Honor please, I suggest to you and to the Court that before we proceed on that outline that it might be well to get this damage question, you know, out of [35] the case. We have a special motion on that, 12(e) and 12(f) addressed to paragraph 20, I believe, of

the complaint, and if that goes out on motion, then we are no longer concerned from our standpoint.

Judge Bell: Well, I thought it would be best to find out what the facts were before we ruled on the damage motion.

Mr. Bloch: Of course, the Court is protecting us on all rights as to jury trial and what-not and so forth.

Judge Bell: Exactly.

Mr. Bloch: O. K.

Judge Bell: Exactly. Now, what we want to do—there are certain facts—for example, the requests for admissions that you made.

Mr. Moore: Yes, sir.

Judge Bell: We could go down that, you see, and this will give us some stipulated facts.

Mr. Bloch: I will let Mr. Owens handle that part of it.

Judge Bell: All right, pull that chair up by Mr. Moore and lets work along together on this and try to get the facts straightened out. Now, let me ask the questions, Mr. Moore.

The first one is that the Jury Commissioners of Taliaferro County, Georgia, are all members of the so-called White or Caucasian Race. Is that true, Mr. Owens?

Mr. Owens: We have admitted that, Your Honor.

[36] Judge Bell: You have?

Mr. Owens: Yes, sir.

Judge Bell: Where is the response. I don't know whether I have that or not.

Judge Scarlett: Have you got it?

Mr. Moore: That's it up there, I think.

Judge Bell: Will somebody let me have a copy of the answers?

Mr. Owens: May I look through it right quick? Maybe I can spot it.

Judge Bell: I went through my file. I didn't see it. All right, that's admitted.

The next one is the Jury Commissioners of Taliaferro County have been members of the so-called White or Caucasian Race for at least 50 years. Your answer is your present knowledge doesn't encompass 50 years, which you think probably that is so.

Mr. Owens: That's correct, Your Honor.

Judge Bell: —Within recent memory there has been no Jury Commissioners in Taliaferro County—

Mr. Moore: —Negro members.

Mr. Owens: The same effect, Your Honor.

Judge Bell: Yes. Four: Members of the Board of Education of Taliaferro County are Members of the White or Caucasian Race. You admit that, I suppose?

Mr. Owens: That's correct.

[37] Judge Bell: Five. Within recent memory, at least 50 years, the Board of Education Members have been White. So, that's admitted. —Never been within recent memory any Negro Member—that's admitted.

Seven. No children of any Members of the present Board of Education of Taliaferro County attended public schools of Taliaferro County. Admitted.

Eight. No children of the so-called White or Caucasian Race attend public schools in Taliaferro County. That's admitted.

Is that true again this year?

Mr. Owens: That is, Your Honor.

Judge Bell: I know there were none last year. Jury list for grand and traverse juries of Taliaferro County contain no more than 30% members who are Negroes.

You say you don't know what the ratio is?

Mr. Owens: That's correct, Your Honor.

Judge Bell: How do you know that, Mr. Moore?

Mr. Moore: Your Honor, we have had people who have lived in the county for upward to 70 years who have examined the list and they identified eleven persons on the list of 130 people as being Members of the Negro Race.

Judge Bell: 11 out of 130?

Mr. Moore: Yes, sir.

Judge Bell: Is that the Grand Jury list?

Mr. Moore: The Grand Jury list.

[38] Judge Bell: Now, you expect to put a witness on to testify to that?

Mr. Moore: Yes, sir.

Judge Bell: Well, lets hold that out. That's question No. 9. Now, have you got some one who is going to testify as to the number on the Traverse Jury too?

Mr. Moore: Yes, sir.

Judge Bell: All right, what do you expect that to show?

Mr. Moore: 56 Negroes and 272 whites for a total of 328.

Judge Bell: All right. We have got to hear the evidence on that.

All right. Ten. The Jury List contains no more than 25% members who are female. They say they don't know about that.

Mr. Moore: We have examined the list, Your Honor. Now, on the Grand Jury there are no women of either race.

Judge: Now, are you trying to make another constitutional question this morning that women have a right to serve on state juries? I know that we had a Three Judge

District Court to rule that in Alabama, but so far as I know the Supreme Court has never ruled on it.

Mr. Moore: Yes, sir. We make that contention, Your Honor.

Judge Bell: You don't have to raise any more points [39] than you have already raised.

Mr. Moore: That's true. But we make it two ways, Your Honor. One is exclusion of women. Women have a right to serve, which may raise another question.

Judge Bell: I don't believe you have that right. You see, you are not representing anybody on trial.

Mr. Moore: Your Honor, this is a better method because the federal law expressly provides for raising it in civil actions. It is better to raise—

Judge Bell: —Only on Race, the Civil Rights Statute.

Mr. Moore: Well, Your Honor—

Judge Bell: —It says Race. It doesn't say anything about sex.

Mr. Moore: White against Crook was a civil action before Three Judges, a court civil action, where this question was raised among other things.

Judge Bell: Well, has White against Crook ever been followed up? I thought it was sorta noted by the fact that nobody has ever followed it. Was that a civil action, you think?

Mr. Moore: Yes, sir, a Three Judge Court action in Alabama.

Judge Bell: We will let you offer evidence on that.

Mr. Moore: Another way of reaching the same thing is to say that due process should—or rather to say that true cross section should reflect all people who are not excluded by [40] state statutes.

Judge Bell: Now, you don't want to confuse the federal standards with the state standards.

Mr. Moore: No, sir. All women can't serve in Georgia and I think—

Judge Bell: And they don't have to serve.

Mr. Moore: I think they may have repealed that provision where they could request a written permission to be excluded. I am not sure about that.

Mr. Owens: I don't think they have, Your Honor, in the Code when I read it yesterday.

Judge Bell: We will let you offer evidence at least as to sex.

All right, then eleven is that there are no white teachers in the Taliaferro County School System. You admit that?

Mr. Owens: We do.

Judge Bell: All right. "Twelve, there are no free school buses provided for children who attend the public schools of Taliaferro County." You deny that as being completely false.

"At the present time seven free school buses provide transportation for at least 95% of the students who attend the public schools in Taliaferro County."

What have you got to say to that, Mr. Moore?

Mr. Moore: You can cross that out. There are some ten [41] per cent of the kids who attend school or who walk—

Judge Bell: Well, that's true everywhere. I walked to school all of my life.

Mr. Moore: But is probably that they are in that area that is zoned where you don't have to provide school buses.

Judge Bell: Well, ask Mr. Turner. Check with your client and see if you can stipulate that this is a fact, number twelve.

Mr. Moore: Yes, sir.

Judge Bell: Stipulate it as a fact. All right.

Mr. Moore: Yes, sir.

Judge Bell: Now, thirteen is "Members of school administration of Taliaferro County are all members of so-called white or Caucasian Race", and you answer that by saying one person. You are talking about Mrs. Williams.

Mr. Owens: That's correct, Your Honor.

Judge Bell: Thirteen: "Members of"— No, that is one that I have just had.

Fourteen. Now, we get down to the expenditure of funds per pupil is less today than it was when there; were members of the white race attended public schools.

You answer that by saying that "present per pupil expenditure of funds is greater today."

Now, it might be greater because there are fewer children. It seems to me that this is a very nebulous question [42] and answer—

Mr. Owens: —I agree.

Judge Bell: I think we have got to have the amount of money.

Mr. Owens: That's in the answer to the interrogatory.

Mr. Moore: We have established the amount of money being spent.

Judge Bell: Well, I don't have those. We will get to that in a minute though. Lets see.

Mr. Owens: May it please the Court—

Judge Bell: —Can't you just call those out?

Mr. Owens: Yes, sir.

Judge Bell: And we will just stipulate that now.

Mr. Owens: At the present it is \$434.82 per pupil.

Judge Bell: All right.

Mr. Owens: Whereas before it was \$322.76.

Judge Bell: How much?

Mr. Owens: \$322.76. That's the answer to the interrogatory as filed by the Members of the Board of Education.

Judge Bell: All right. Now, how would that figure out on the total sum. You would have to multiply those figures by the number of students in school.

Mr. Owens: That's correct, Your Honor, you would.

Judge Bell: Is that based on the average daily attendance?

[43] Mr. Owens: That's based on the financial report as sent to the State Board of Education. I would assume that it is based on the ADA.

Judge Bell: Well, this morning, sometime, put Mrs. Williams on the stand and lets just establish the amount that was spent, the total amount that was being spent on the schools prior to this current situation. I don't know if that establishes anything because you might not need as much money, if you don't have as many pupils. You wouldn't need as many teachers.

Mr. Moore: Well, we would like for that complete picture to be before the Court.

Judge Bell: All right. You have got these two figures, maybe that's enough then.

All right, fifteen: You have got the number of teachers. No, the white teachers are less. That is a self evident fact.

Mr. Owens: That's correct, Your Honor.

Judge Bell: "Average level of higher education as seen by the teachers is less today than it was during the period when the public schools were attended by members of the white race." That's sixteen.

Mr. Moore: They say it is about the same.

Judge Bell: They say it is about the same. Is that significant in your case?

Mr. Moore: No, sir, I don't think that is critical.

[44] Judge Bell: Well, do you think that is a fair statement, that it is about the same?

Mr. Moore: I would suspect it would be a little higher. Ordinarily the Negro teachers go further in school.

Judge Bell: I would think it would be higher now than it was before. Why did you say it was less then?

Mr. Moore: I wanted to find out.

Judge Bell: Oh, I see. You were trying to find out.

Mr. Moore: Yes, sir. The other thing, there is attached to one of the documents a list of the teachers in the school and the schools they have attended, the degrees that they hold.

Judge Bell: All right. Seventeen: "The number of library books per pupil in public schools is less today than it was when the members of the white race pupils were in the school system."

The answer is that the number is greater. I wouldn't think it would be any less. How could it get less? Did they burn some books or throw any away or anything? They still have got the same books, haven't they?

Mr. Moore: It would be over crowding, Your Honor. I think this accounts for the fact the white kids are no longer in the school system.

Judge Bell: The school wouldn't have thrown the books away, would they?

Mr. Moore: When you divide them by the number of students [45] you come out with a different figure.

Judge Bell: Mr. Owens, what do you know about that?

Mr. Owens: Well, if it please the Court, in our—

Judge Bell: —Have you got rid of any books?

Mr. Owens: Not that we know of. We show in our answers to the interrogatories presently 8.7 library books per public school student. In 1964, 5 library books per public school student.

Judge Bell: I imagine that the books they had in the Alexander Stephens Institute were probably put into this—

Mr. Moore: —Either into this school or in the private school.

Mr. Owens: May it please the Court, we show in our answer that the Board of Education has not contributed the first penny—

Judge Bell: —I was going to say, have you got any evidence that they are putting any books in the private schools? If you could prove that, you would have a better case.

Mr. Owens: Your Honor, we don't think there is any evidence to support that. That's getting off into the realm of wondering, you know.

Judge Scarlett: I didn't get that. Did you say they took them out at night to do that?

Mr. Moore: They didn't probably take them out at night.

[46] Judge Scarlett: You mean to say that Board of Education would take the books out?

Mr. Moore: We couldn't prove that, Judge.

Judge Scarlett: Well, lets don't say it then.

Judge Bell: All right. Eighteen: "The average number of pupils in the class room is greater today in the public schools than it was when white children were attending."

You say that is true? 27 now and it was 25.

Mr. Owens: Yes, sir.

Judge Bell: Why did you run it up? I mean, why don't you use part of the other building?

Mr. Owens: May it please the Court, I am not familiar with the physical lay out of the facilities. Those are the figures that we gave.

Judge Bell: Well, the Court is very familiar with it.

Mr. Owens: Well, those are the figures we gave.

Judge Bell: All right, you have gone up from 25 to 27. "Number of pupils per teacher is greater today." I guess that is the same answer, isn't it?

Mr. Owens: Yes, sir.

Judge Bell: 27 and 25.

Mr. Owens: That's correct, Your Honor.

Judge Bell: Twenty. The number of specialists per public. "They say a specialist means guidance teachers, speech therapy, music teachers and the like." They have less now. You [47] deny that. You say you have a full time band director. You didn't have a band director when the white children were going.

Mr. Owens: That's correct, sir. That was the only specialist employed.

Judge Bell: You don't have any guidance teachers?

Judge Bell: No, sir.

Judge Bell: Vocational teachers?

Mr. Owens: No, sir.

Judge Bell: Reading specialists, or anything like that?

Mr. Owens: No, sir.

Judge Bell: Can we stipulate when these vacancies came about on the school board?

Mr. Owens: You mean a vacancy, Your Honor, in the sense that a person has not been elected by the Grand Jury?

Judge Bell: Well, I understood that you had five members and that three resigned.

Mr. Owens: They did at one time, I think, but the board is presently composed of all of its members. They fill the vacancies themselves as provided by law.

Judge Bell: Well, that is a part of the constitutional provision, that they can elect people themselves until the next Grand Jury meets?

Mr. Owens: That's correct, sir.

Judge Bell: They now have five?

Mr. Owens: Yes, sir.

[48] Judge Bell: Well, lets put that down. Who were the five to begin with?

Mr. Owens: Just a minute, Your Honor.

Judge Bell: Cranston Jones, is one.

Mr. Owens: Cranston Jones is not presently a member, Your Honor.

Judge Bell: All right, lets just put them down. W. A. Drinkard.

Mr. Owens: Yes, sir. He is deceased.

Judge Bell: Jones resigned?

Mr. Owens: Yes sir, he resigned June 30th, 1966.

Judge Bell: When did Mr. Drinkard die?

Mr. Owens: About a month ago, I think. I am not sure.

Mr. Bloch: He resigned before he died.

Judge Bell: Well, he had resigned. That would be the statute. When did he resign?

Judge Scarlett: Well, he had to resign before he died.

Mr. Owens: We will have to get that later.

Judge Bell: All right. Now, the next man is H. E. Williams, Jr.

Mr. Owens: He served until September 1967, Your Honor, and he resigned.

Mr. Moore: That vacancy was filled by the Board of—

Judge Bell: —Well, don't get into that yet. Just minute. 1967?

[49] Mr. Owens: Yes, sir.

Judge Bell: All right, Carl Chapman?

Mr. Owens: He is presently a member, Your Honor.

Judge Bell: Mrs. Willie Mae Fambrough.

Mr. Owens: She completes her 13th year on March 2nd of this year.

Judge Bell: Is she still a member?

Mr. Owens: She is still a member.

Judge Bell: All right, now, who has been elected?

Mr. Owens: Excuse me just one minute, Your Honor. May it please the Court, Mr. Horace Hill. . . .

Judge Bell: —Horace Hill?

Mr. Owens: —Took Wiley Cranston Jones' place and he has been confirmed by the Grand Jury. Mr. Moore Pittman took Mr. W. A. Drinkard's place and he has not yet been confirmed by the Grand Jury.

Judge Bell: What was his name—Moore Pittman?

Mr. Owens: Yes, sir, Moore Pittman.

Judge Bell: Is he related to the Sheriff?

Mr. Owens: I don't know, sir.

Judge Bell: You don't know that. All right. He is elected by the board but has not yet been confirmed.

Mr. Owens: That's right, Your Honor.

Judge Bell: All right, who is the next man?

Mr. Owens: Mr. Lary Beazly took Mr. Horace Williams, Jr's place and he has not yet been confirmed.

[50] Judge Bell: B E A S L Y. (Spelling)

Mr. Owens: I think it is B E A Z Y, (Spelling) Your Honor.

Judge Bell: He has been elected by the Board but is not yet confirmed?

Mr. Owens: That's correct, Your Honor.

Judge Bell: Are any of these gentlemen Negroes?

Mr. Owens: No, they are not, Your Honor.

Judge Bell: All white?

Mr. Owens: They are all white, Your Honor.

Judge Bell: Do the Negroes pay taxes in Taliaferro County? Do you have any Negroes there paying taxes?

Mr. Owens: We will assume that there are many Negroes paying taxes, Your Honor.

Judge Bell: You don't think it would be fair to put some Negroes on the Board of Education though by the fact that they live there and pay taxes?

Mr. Owens: May it please the Court, I don't have—

Judge Bell: —You don't have anything to do with that?

Mr. Owens: I don't have any opinion as to that, or anything to do with the selection.

Judge Bell: Right. You are not in the selecting business.

Mr. Owens: That's right, Your Honor.

Judge Bell: All right.

Mr. Moore: Now, Your Honor, I think there are some other facts that are relevant to the Board of Education and the School [51] System that have been developed by the interrogatories and perhaps we can go into that.

Judge Bell: What is that?

Mr. Owens: Mr. Moore suggest that we go into the interrogatories and some of those facts as established.

Judge Bell: All right, will you let the court have a set of the interrogatories and answers? Mr. Owens, this man here, Durham, his answer, he is on the Grand Jury— Oh, I see, he has moved out of the County. Moved to Greene County. His daughter is going to Greene County.

Mr. Owens: That's correct, Your Honor. There are three Grand Jurors, Your Honor, Mr. Bacon—

Mr. Moore: —I thought we would stick with the Board of Education.

Judge Bell: Yes, lets finish that, first.

Mr. Owens: Excuse me. I thought Your Honor was through. I thought you were looking at the Grand Jury.

Judge Bell: I was. I have gone back. I put it down though. All right, Mr. Moore, what do you find significant about this set of answers, other than the same things you have already established?

Mr. Moore: Your Honor, with respect to No. 10 "Give the names, addresses and educational back ground of races of those who teach in the public school of Taliaferro County, Georgia." The answer to that is Exhibit "A" which does show the race and [52] schools to which the teachers are attending.

Judge Bell: They don't have anybody with a Master's Degree. All right. Now, what is the Georgia Law on that? What does the Georgia Law provide about the qualification of a School Board Member? That they have to be learned in the elementary branches of the English Language?

Mr. Moore: Yes, sir.

Judge Bell: What else?

Mr. Moore: You have to be a freeholder, and favorable to the common school system, Your Honor, and of good moral character and a freeholder.

Judge Bell: How can anybody serve on the School Board who is not sending their children to a school in the county, if they have children, how can that show that they are favorable to the common school system? Does that mean they favor Greene County or Wilkes County? Do any of these school board folk have children, any of of these school board members have children?

Mr. Owens: May it please the Court, lets take them one by one. Mr. Jones is no longer a member, so he is out of the picture.

Judge Bell: Lets get down to the new members. Lets start out with Mr. Chapman.

Mr. Owens: Mr. Chapman, he has no children.

Judge Bell: How do you know he is favorable to the common school system?

[53] Mr. Owens: May it please the Court, I assume that the Grand Jurors who know him would ascertain that.

Judge Bell: How about Mrs. Willie Mae Fambrough?

Mr. Owens: She has no children, Your Honor.

Judge Bell: Forrest Hill?

Mr. Owens: May it please the Court, no question was directed by the plaintiff to Mr. Hill, Mr. Pittman or Mr. Beazey, and I have not ask them—

Judge Bell: Could you advise the Court if they have children and, if so, are they in school in Taliaferro County?

Mr. Owens: I will ascertain that, Your Honor. I have not. I know they are not in public school in Taliaferro County, if they have any, and I will have to ascertain that.

Judge Bell: It's hard for me to imagine anybody being in favor of common schools and not send their children to common schools. Those are the qualifications, to be a freeholder, be in favor of the common schools, and have

an elementary knowledge of the elementary branches of the English education.

Mr. Owens: That's correct.

Judge Scarlett: And a good moral character, too.

Judge Bell: I don't think it says that. You don't have to be of good moral character.

Mr. Owens: That's in the statute, Your Honor. It is not in the constitutional provision.

Judge Bell: All right. What do you think that means, Mr. Owens, to be learned in the elementary branches of the English [54] Education? What kind of an education does that mean you ought to have to be on the school board, or does that prove anything? What does it mean?

Mr. Owens: May it please the Court, I guess if it were up to me to define that it might be one thing, and it could be up to the Members of the Grand Jury to—

Judge Bell: Mr. Evans probably can tell us.

Mr. Owens: It is on the Grand Jury to define that. They might have a different connotation, so I think we might—

Judge Bell: —We will let Mr. Evans argue that. He is representing the State. He is interesting in preserving these statutes.

Mr. Owens: He is, Your Honor.

Judge Bell: He probably can give us some enlightenment on what that means. Now, what was question No. 6?

Mr. Owens: That was with reference to the named individuals and their children, if it please the Court.

Judge Bell: Now, who was he?

Mr. Owens: Well, Mr. Cranston Jones, who is no longer a member, has a child who attends the Jonesboro High-school.

Judge Bell: All right, who is "D"?

Mr. Owens: That's Horace Williams, Jr., if it please the Court, and he is no longer a member.

Judge Bell: Is he any relation to the School Superintendent?

[55] Mr. Owens: I do not know. He is not, according to Mrs. Williams.

Judge Bell: Then he has resigned since you found out that he had three children going to Greensboro High-school?

Mr. Owens: He resigned in September 1967, Your Honor.

Judge Bell: When did he start his children to Greensboro Highschool?

Mr. Owens: I do not know the date, Your Honor.

Judge Bell: Now, how can those children attend Greensboro Highschool and the Negro children not be allowed to?

Mr. Owens: I do not know the facts surrounding that, Your Honor.

Judge Bell: Anybody here representing Greene County Schoolboard? (No response) In other words, there are two men on the School Board whose children were going outside the County have resigned.

Mr. Owens: That's correct, Your Honor. Whether they were going outside the County before or after they resigned, I do not know, Your Honor.

Judge Bell: Well, find that out and let us know so we can stipulate that. Lets see. Now, that's Cranston Jones and H. E. Williams, Jr. You say that Chapman and Mrs. Fambrough have no children.

Mr. Owens: That's correct, Your Honor.

Judge Bell: Do they have any grandchildren? Tell us about that.

[56] Mr. Owens: Your Honor, they have never had any children, therefore they do not have any grandchildren.

Judge Bell: All right. What is question 22?

Mr. Moore: Now, Your Honor, it would be interesting to find out whether the Superintendent has any children that—

Judge Bell: —Well, we can't go into that, because she is elected by the people. She doesn't have to meet the same standard.

Mr. Moore: Yes, sir. It might be—

Judge Bell: —I think she had a boy going to a Pref School the last time we were down here, but that would not be the same.

Mr. Moore: It might be somewhat of a test whether or not she is favorable to the common schools.

Judge Bell: Well, she doesn't have to be favorable to the common schools.

Mr. Moore: I mean whether the Board of Education—

Judge Bell: —Well—

Mr. Moore: —Whether the Board of Education is favorable to the common schools, continuing with the Superintendent.

Mr. Owens: No. 22, Your Honor, is "Do the Public Schools of Taliaferro County receive any funds from the Federal Government, if so, state the amount.

Judge Bell: \$63,000.00.

Mr. Owens: That's correct, Your Honor. That was the [57] total amount that was received.

Judge Bell: Now, is that all the funds that they would be entitled to. The last time we were down here HEW was holding up some funds, withholding funds, from Taliaferro County. Did they ever release the funds?

Mr. Owens: I believe they did, Your Honor.

Judge Bell: Do you know about that, Mr. Moore?

Mr. Moore: No, sir, I don't.

Judge Bell: They had quite a quarrel about that, or we had quite a quarrel about that, you know.

Mr. Moore: HEW just comes and go.

Judge Bell: Well, they were holding up the funds.

Judge Scarlett: I think Mrs. Williams nodded her head back there.

Mr. Owens: She nodded affirmatively, Your Honor, that they were released.

Judge Bell: Taliaferro County is getting all of the federal funds that they are entitled to now then?

Mr. Moore: Maybe, Your Honor. There are about 452 different federal programs.

Judge Bell: Oh, I know, but they haven't got the money to hire somebody in Washington to represent them. The City of Atlanta has even got a man on the payroll in charge of finding federal funds because there are so many federal funds, so many agencies, and unless you are a big operation and can hire you a [58] man to advise you and ferret them out there is no way to get all the federal funds.

Mr. Moore: Perhaps if we had a school board that was disposed to the Public School System, whatever that means, they would ferret more of these funds.

Judge Bell: How would they do it? Go to Washington?


Mr. Moore: Well, there are statutes and—

Judge Bell: —Do you know the amount that Fulton set up in Washington to employ some one to find federal funds?

Mr. Moore: Yes, sir.

Judge Bell: A little place like Taliaferro County couldn't afford that.

Mr. Moore: They can get a lot of this information from the Office of Government Printing. You could hire a specialist if you wanted to create a job, but actually you



could get this information from the Office of Government Printing.

Judge Bell: All right, lets see now. Lets finish this list up. Now, in Taliaferro County, you are operating two school buildings?

Mr. Owens: That's correct, Your Honor.

Judge Bell: That's Taliaferro County Elementary School and Taliaferro County Highschool. Now, which one use to be the Alexander Stephens Institute?

Mr. Owens: The Elementary, Your Honor.

Judge Bell: That's the only school buildings in the [59] County as I understand, is that true?

Mr. Owens: As far as I know.

Mr. Moore: Except for the old, the original school building that is right across from the Gym, and it is now the private school. I think that was sold a long time ago.

Judge Scarlett: Whatever became of the Alexander Stephens School?

Mr. Moore: It's turned over now, Your Honor.

Judge Bell: That's the Taliaferro County Elementary School.

Judge Scarlett: I didn't catch it. All right.

Judge Bell: Question 25. You have an average daily attendance in the Elementary School of 283. Highschool a 175. Now, can any one advise us how many white children are attending the private schools?

Mr. Owens: Just one minute, Your Honor. I think I can give you the approximate figure. Answer No. 28, Your Honor.

Judge Bell: 28?

Mr. Owens: Yes, sir. It is approximately 72 pupils who attend the private schools.

Judge Bell: The first through the tenth grades.

Mr. Owens: That's correct, Your Honor.

Judge Bell: Now, question 26: \$267,000.00. Is that State support? What is that?

Mr. Owens: May it please the Court, that is the total budget and in item 27 it is itemized as to where the money came [60] from. That's a budget figure. It is not necessarily a cash figure, Your Honor.

Judge Bell: I see. It says \$9,000.00 of it locally.

Mr. Owens: Yes, sir. •

Judge Bell: Now, what is the tax. What is the levy? What is the number of mills?

Mr. Owens: I am sorry, I don't know, Your Honor.

Judge Bell: Well, find out. Let's get that in the record. As somebody. Seven and three quarters, I believe she said.

Mr. Owens: Yes, sir.

Judge : All right, let's get two more questions answered. The next one is "What was the levy when the whites were attending the schools? And the second one is "Has there been any recent re-evaluation of the property?"

(Note: Mr. Owens conferring with one of his clients.)

Mr. Moore: Your Honor, that would be subject of another law suit, because a North Carolina firm that did these evaluations is suing the county. I think Your Honor had something—

Judge Scarlett: —I have been hearing about it. I haven't got the pleadings yet.

Mr. Owens: Mrs. Williams says that the millage is now lower, that due to the re-evaluation the county is getting more tax funds in than it was in the preceding years.

Judge Bell: Judge Morgan suggests that the best thing to do is to get the total old digest and the total new digest, [61] total old levy and the total new levy. Let us have that sometime this morning.

Judge Scarlett: Whose doing all of that—checking?

Judge Bell: They have got a dozen experts sitting out there in the audience. Judge Morgan asks this question: In any recent year have ad valorem taxes levied for school purposes exceeded \$39,000.00? That would be a good approach to it.

Mr. Owens: For the last five years, you would say, Your Honor?

Judge Bell: Yes. That might be easier. You are liable to have to call up Crawfordville to find the tax digest.

Mr. Owens: I might have to do a lot of calling.

Judge Bell: This \$39,000.00, Mrs. Williams probably knows about that. All right, now is there anything else about the schools we need to get into the record?

Mr. Moore: Your Honor, I think the Court might want to look at the number of teachers before and after. Questions 31 and 32. Now, 31 is "How many teachers are there in the public schools of Taliaferro County today"? The answer is "Eighteen."

Judge Bell: All right.

Mr. Moore: "And how many teachers were in the public schools of Taliaferro County in 1964?" And the answer is "Thirty three."

Judge Bell: Down from 33 to 18.

Mr. Owens: Correct:

Judge Bell: Of course, that's only relevant if we know [62] the number of students they had back in 1964. The Court can offhand take notice from the other record that

there were a good many more in 1964 than there are now. All right, what else?

Mr. Moore: Now, there is another thing that should be noted also, that is, that the Board of Education meets regularly once each month which is the answer to interrogatory No. 34.

Judge Bell: Yes.

Mr. Moore: And in the answer to number 33 they received for their services \$20.00 per month, and in answer to No. 35 the meetings are held at 10:00 o'clock A.M., on the first Tuesday in each month in the office of the County School Superintendent at the County Courthouse in Taliaferro County.

Judge Bell: Right.

Mr. Moore: And they answer that meetings are open to the public and minutes are kept.

Judge Morgan: Does the records show that the law provides what date the County School Board of Education sets or recommends the tax rate?

Mr. Owens: At what time of the year, Your Honor?

Judge Morgan: Yes, what time of the year?

Mr. Owens: I don't know, but there is a statute to that effect.

Judge Morgan: It has to be sometime early enough to get out the tax notices.

Mr. Owens: It is usually done in the spring of the year, Your Honor. There may be a statute to that effect, but in looking [63] at the statute in general I did not see one that required you to ascertain by a particular date.

Judge Bell: It is done each year, though.

Mr. Owens: Done each year in the spring.

Judge Morgan: And whoever the levying official is, whether it is the ordinary or the County Commissioners

it has to accept whatever that is up to 20 mills? That's the law, isn't it?

Mr. Owens: I believe generally that's the way the statute reads, Your Honor. There is some dispute as to whether they have to accept it or not.

Judge Morgan: Well, now, the case on that point, as I recall, from Wilkes County a number of years ago they are required to accept whatever the recommendation of the Board of Education is, the levying authority of the county.

Mr. Owens: I am not familiar with that statute, Your Honor.

Judge Morgan: I think that is what we are fighting about in this case, or it is going to get down to it. If you have a school board that will levy a tax up to whatever they see fit that—

Mr. Moore: —Yes, sir, the taxation—

Judge Bell: Now, let's go over to the Grand Jurors situation. I looked at these answers.

Mr. Moore: Your Honor—

[64] Judge Bell: —Have you got something else on the schools?

Mr. Moore: I just wanted to say that I think the law is that the school board recommends the millage, the amount of the millage, and that is in Code Section 32-1118.

Judge Morgan: And they are required to levy that tax according to the recommendation, whoever the levying authority is, whether it is the Ordinary or the County Commissioners, they are required to do that.

Mr. Moore: Yes, sir.

Judge Bell: All right, I think that's about as much information as we are going to be able to put in on the schools, unless some one, Members of the Court, or Counsel can think of something else we ought to get in the record.

Mr. Moore: We want to put this in; that the plaintiffs in this case have been unsuccessful in their efforts to present grievances to the Board of Education.

Judge Bell: Wait a minute now. They are not going to stipulate that.

Mr. Owens: No, sir, we can't do that.

Judge Bell: So you are going to have to prove that. Now, what else was it we said that you would have to prove? Questions 9 and 10?

Mr. Moore: Yes, sir.

Judge Bell: Wait a minute now. Have one of your associates to keep record of these things. Questions 9 and 10 [65] on the Request for Admissions, you want to offer proof on that. Now, you want to offer some proof on your complaints, processing of complaints to the school board.

Mr. Moore: Yes, sir.

Judge Bell: Now, what else do you think you need to offer evidence on? One thing we are going to have to have some proof on is that Mr. Turner lives in Taliaferro County and his daughter is in school in Taliaferro County School System. Can you stipulate that?

Mr. Owens: May it please the Court, as far as I know we can.

Judge Bell: All right, we will stipulate that. I wonder if it makes any difference whether Mr. Turner was a freeholder or not?

Mr. Moore: It might or might not.

Judge Bell: It says that he was a registered voter. I don't know what that has to do with it, unless you are just in the habit of putting that in a complaint.

Mr. Moore: The reason for that, the law was changed, you see, to require the jury list to be selected from—

Judge Bell: —Registered voters?

Mr. Moore: Registered voters.

Judge Bell: All right. Mr. Owens wouldn't have any way of knowing whether he was a registered voter or not, and you haven't got any clients that are in the voting business?

Mr. Owens: No, sir. Your Honor, I would prefer to [66] look at the list unless he himself can state whether or not he voted at the general election.

Judge Bell: Mr. Turner, stand up there a minute. Did you vote in the last general election?

Mr. Turner: Yes, sir, I did.

Judge Bell: You did?

Mr. Turner: Yes, sir.

Judge Bell: All right.

Mr. Owens: We are satisfied, Your Honor.

Judge Bell: All right, they are satisfied. We can stipulate that. Now, let me ask him one other question. Mr. Turner, stand up again. Are you a freeholder? That means do you own any real estate, not personal property, but real estate?

Mr. Turner: Yes, sir.

Judge Bell: All right.

Mr. Owens: He does.

Judge Bell: Well, let's get that in as a fact. I don't know if that is significant at all, but he is a freeholder. All right.

Mr. Moore: I wonder if we could stipulate—

Judge Bell: —Now, you stipulated that Sandra Juanita Turner is in school?

Mr. Moore: Yes, sir.

Judge Bell: In the Taliaferro County School System?

Mr. Moore: Yes, sir.

[67] Judge Bell: Is that so, Mr. Owens?

Mr. Owens: Yes, sir.

Judge Bell: All right.

Mr. Moore: Your Honor, I wonder if we could stipulate whether or not there is a PTA in Taliaferro County?

Mr. Owens: We don't see if that is material to anything.

Judge Bell: I don't think so either. Do you think that has some significance in your case?

Mr. Moore: Well, it involves parents in—

Judge Bell: —They can get up a PTA if they want to get up one.

Mr. Moore: I don't know, Your Honor. I think they have to have some connection with the school.

Judge Bell: Oh, now, we don't want to get off into that. We have enough problems without getting off into the PTA business.

Mr. Moore: Well, it is one of the—

Judge Bell: —I once attended a meeting of the PTA, once.

Mr. Moore: Well, at least Your Honor had the privilege of going.

Judge Bell: That's right.

Mr. Moore: Even though you were not charmed to come back.

Judge Bell: Right.

Mr. Owens: May it please the Court, we think that is [68] immaterial and we don't think they can show that they have been denied the privilege of establishing a PTA.

Judge Bell: Well, when he puts the proof on with regards to his inability to have a complaint processed to the school board, if he can show that he tried to get a PTA organized in Taliaferro County and the Board wouldn't allow him to do so, he can do that. That would fall under the heading of a general complaint.

Mr. Moore: I believe the next matter that would be proper to go into the answers of the defendants with reference to the Grand Jurors in their interrogatories.

Judge Bell: All right. But just let me summarize over them. I read them. You sued three men and one has never been a Grand Juror, one has moved out of the County and that leaves one who was a grand juror in 1965?

Mr. Owens: 1956, Your Honor.

Judge Bell: 1956. Well, you are on about as thin a ground as you can get on.

Mr. Moore: Your Honor, one of the defendant grand jurors served in 1965.

Judge Bell: I thought he had left the county.

Mr. Owens: '56 was the date, I think.

Mr. Moore: 1965.

Judge Bell: He says that in '65 he was a grand juror.

Mr. Owens: May I transpose the figures on that?

Mr. Moore: He was a grand juror in '67.

[69] Mr. Owens: Let me see. Yes, he did say '65 and prior thereto.

Judge Bell: Mr. Durham now says he lives in Greene County.

Mr. Owens: That's correct, Your Honor.

Judge Bell: He says in '67, but he immediately left.

Mr. Moore: W. W. Fouche is a Member of the Grand Jury at the present time.

Judge Bell: Where do you see that?

Mr. Moore: Well, we have the jury list.

Mr. Owens: Of the present grand jury?

Mr. Moore: Yes.

Mr. Owens: Is that the jury list or the list of the Grand Jury?

Mr. Moore: That's the jury list.

Judge Bell: You mean he is on the Master List?

Mr. Moore: Yes, sir.

Mr. Owens: That doesn't put him on the present Grand Jury, Your Honor.

Judge Bell: He may never serve.

Mr. Moore: We weren't able to get the Grand Jury list in advance of—

Mr. Owens: —May it please the Court, I think the record will show that he didn't ask for a list. We would have been delighted to have gotten it.

[70] Mr. Moore: In advance of the trial.

Judge Bell: Well, he admits here that "I am on the list."

Mr. Owens: Yes, sir.

Judge Bell: But we know that the list means the Master List, or the roll.

Mr. Owens: Right. I don't think the associate understood the difference, Your Honor.

Judge Bell: And the point is that he is not on the Grand Jury. He has not been chosen as one of the 23 to serve on the Grand Jury.

Mr. Owens: That's right. That's correct.

Mr. Moore: We don't contest that, Your Honor.

Judge Bell: All right, we have got that straight now.

Mr. Moore: We are suing him as class, and he has to stand or fall on whether or not he can represent—

Judge Bell: —I tell you, Mr. Moore, you are on mighty thin ground on the Grand Jury part of your complaint, and you are also on thin ground for damages, but we are not going to make any ruling on that right now until we can study it out some more. The Grand Jurors are named, they are really made parties just like we made the School

Board Members in Warren and Wilkes and Greene Counties, they were made parties for purpose of obtaining relief. You sued them for that purpose, and whether or not the Grand Jury list is such an entity that you [71] can subject a member, or somebody whose name is on there, to be sued is something about which I have grave doubts.

Mr. Moore: I take it from that that the Court isn't saying that we should bring in additional parties who are members of the Grand Jury?

Judge Bell: No. If you brought in 25 I don't think it would make any difference.

Mr. Moore: Just the sufficiency of this approach to the case—

Judge Bell: —Right.

Mr. Moore: And it is a question of law rather than the necessity of bringing in other party defendants—Grand Jurors.

Judge Bell: Right. And I would have serious doubt if the Court would have the—well, I wouldn't say didn't have the power, but I have serious doubts that the Court could order a particular Grand Jury to appoint people to some office, such as the Board of Education, because that is such a discretionary thing about who they would pick. Now, the Court might vacate the entire school board, but I doubt that. I don't know as it helps your case any to have the Grand Jurors in but we won't rule on that right now.

Mr. Moore: Your Honor, I might say that at least two of these Grand Jury members that we did name admitted taking part in the school board election.

[72] Judge Bell: That's right. We know that. I know that, but that doesn't help your case any. You see, you are missing the point. The point is that just the mere fact that

you have something to do with the Grand Jury doesn't prove anything about what you can do to get the relief that you are seeking. That's what bothers the Court.

Mr. Moore: The adequacy of the named defendants to represent people known as the Grand Jury.

Judge Bell: Right.

Mr. Bloch: Now, that brings up the very question that I was going to call to the attention of the Court. If the Court should decide that there is such a thing as the Grand Jurors being sued as a class, I am sure that the Court will bear in mind that the present Grand Jury System in Georgia and the present class of people who are selected as jurors and consequently Grand Jurors didn't arrive until March 30th, 1967.

Judge Bell: We know that. There might be some of the same people on the list but it would be a happenstance.

Mr. Bloch: That's right.

Judge Bell: Everything has been done over.

Mr. Bloch: That's right.

Judge Bell: All right. Now, the Jury Commissioners, let's move to the Jury Commissioners. Have you got interrogatories on that too?

Mr. Moore: Yes, sir.

[73] Judge Bell: That all Jury Commissioners are white and they are appointed by the Superior Court Judge, Judge Stephens?

Mr. Owens: That's correct.

Judge Bell: And there are no vacancies?

Mr. Owens: No, sir.

Judge Bell: When was the last man that has been appointed?

Mr. Moore: There is a vacancy because there is only five Commissioners, and the law requires six.

Judge Bell: There is one vacancy?

Mr. Owens: Not that I know of.

Mr. Moore: If they have five members, they have got a vacancy.

Mr. Owens: May it please the Court, I think what makes the difference is at one place they mention five people and in another place there is six in the law that sets up the Jury Commissioners. Just a minute, Your Honor. The missing individual is Mr. Reuben Jones who is serving which makes six, Your Honor.

Judge Bell: There are six but only five is sued.

Mr. Owens: Five named in the complaint.

Judge Scarlett: Only five were sued?

Mr. Owens: That's correct. There was one more who was not sued, Mr. Reuber Jones.

Judge Bell: Mr. Moore, don't you think you ought to [74] amend and add him as a party and have him served?

Mr. Moore: Yes, sir.

Judge Bell: Just so you get it all in order, Reuben Jones is this gentleman's name?

Mr. Owens: That's correct, Your Honor.

Judge Bell: You have got 130 on the Grand Jury list, and the revision was completed in 1967?

Mr. Owens: That's correct, Your Honor.

Judge Bell: All right. You don't know how many are Negroes and how many are White?

Mr. Owens: No, Your Honor.

Judge Bell: All right. You are going to prove that.

Mr. Moore: Yes, sir.

Judge Bell: All right. Mr. Moore, in answer to number 12, you asked then about the significantly identifiable groups from Taliaferro County and they say they have got White persons, Negro persons, Catholic, Baptists, Meth-

odists and Presbyterians. Under the Supreme Court decisions you have white collar workers, blue collar workers. That's another identifiable group. Are you making any point about that? Wage earners and salary workers?

Mr. Moore: Your Honor, our contention is that—

Judge Bell: —You just want to proceed on race without getting into other areas.

Mr. Moore: We can prove the whole thing, Your Honor.

Judge Bell: Well, you will probably have a hard time proving anything about the blue collar workers in a county this [75] size.

Mr. Moore: We do have background information for the Court, a demography description of the community.

Judge Bell: All right.

Mr. Moore: And we would like to tender—

Judge Bell: —Well, we will get to the evidence when you put your witness on.

Mr. Moore: All right, sir.

Judge Bell: Oh, there is one thing I want to ask: Mr. Owens, what is your age bracket for jury service—21 to 65?

Mr. Owens: That's my understanding.

Judge Bell: Is that so, Mr. Moore? Do you know anything about that?

Mr. Moore: I know it's 21—

Judge Bell: —In some places they put it up as high as 25, because young folks are in school, and they say this creates sort of a problem when you have to call folks and then have to take them off.

Mr. Owens: Well, may it please the Court, in this instance the Jury Commissioners, as a whole, did not say "we are going to step the age limit up," as a practical matter because of one man being in the service or being here. They may have done that.

Judge Bell: But you think the broad outline was from 21 to 65?

[76] Mr. Owens: Yes, sir.

Judge Morgan: Is that the Grand Jurors?

Judge Bell: Well, that's all, the whole list. They just make one list.

Mr. Moore: Well, under the new law you are eligible to go on the list at 18.

Judge Bell: Who said so?

Mr. Moore: Well, it is taken from the voters list.

Judge Bell: Well, they haven't changed the—

Mr. Moore: —Then that would be a ground for disqualification because you don't meet the age limit, qualification under a different statute.

Judge Bell: You mean you have got to put them on and then take them off?

Mr. Moore: Well, I don't think the Jury Commissioners is going out looking at the age when—

Judge Bell: —You can put a man under 21 on the Jury, can't you?

Mr. Owens: Yes, sir.

Mr. Moore: He wouldn't get on the Jury, he would just get on the list.

Judge Bell: Well, what business have they got on the list?

Mr. Moore: Sir?

Judge Bell: What business is it to put him on the [77] list if he is not but 18? Why do that?

Mr. Moore: Well, on this voters registration list they have got people on there who are 18.

Judge Bell: Well, you are operating on the theory that they have got to use a random choice. You are not in the federal court now.

Mr. Moore: We say as a practical matter, Your Honor.

Judge Bell: This is the state Jury list, they don't have to use a random choice that I know anything about.

Mr. Moore: Well, it has to be a true cross section of the community.

Judge Bell: I know. Do you happen to have available a copy of the Civil Rights Bill pending in the Senate now with the Jury section as it applies to state courts?

Mr. Moore: No, sir, I don't have that section.

Judge Bell: Do you have that Mr. Bloch?

Mr. Bloch: I don't have it here with me. I can get it sent over mighty quick.

Judge Bell: Well, suppose you send one to me in Atlanta at my office. I had it somewhere but I don't know where it is. I would just like to see the difference in what the Congress is trying to require between a federal list and a state list, because I think that is pretty important in this case. They are debating it right now in the Senate. It has got a Jury section in it.

Mr. Moore: I just wanted to say, Your Honor, what I was [78] trying to point out is that as a practical matter, since 18 can get on the voters list and at 18 you can vote that you could very well be selected from that list for Grand Jury service. However, when you actually summons them they would be struck because they were less than 21.

Judge Bell: But you don't go about doing things that way, Mr. Moore. You don't go and put a lot of people on the Jury list at 18 just to have the fun of taking them off later on. You just put on the folks that are going to serve some day, that are eligible to serve. On your theory you could put all the people in the penitentiary on the Jury and all the felons so you could take them off later. You

would go get all kind of people that were disqualified and put them on so you could later take them off. That wouldn't be any way to make a Jury list up.

Mr. Moore: Your Honor, for the purpose of our case, we wouldn't be hurt either way.

Judge Bell: All right.

Mr. Moore: To put them on or take them off.

Judge Bell: All I want to know is that it is from 21 to 65.

Mr. Owens: Yes, sir.

Judge Bell: That is the age bracket they use.

Mr. Owens: Yes, sir.

Judge Bell: All right.

Mr. Owens: If there is any difference in that I will [79] advise the court.

Judge Bell: All right. Now, sixteen. All right, I believe that's all we need on—

Mr. Moore: —Your Honor, I think their answer is that there are approximately 2,000—

Judge Bell: —Voters.

Mr. Moore: Voters in the county.

Judge Bell: Well, that is not exactly right. It is about 2500, as I recall.

Mr. Moore: That includes dead people, Your Honor.

Judge Bell: There couldn't be that many voters. How many voters are there in Taliaferro County?

Mr. Owens: May it please the Court, that was the figure the Jury Commissioners gave me that they thought were on that list that was used in that election.

Judge Bell: How many people live in Taliaferro County—about 3500?

Mr. Owens: That's correct, Your Honor.

Judge Bell: And there were over 2000 people voting?

Mr. Owens: They are on the list, Your Honor.

Judge Bell: I don't know, but as registered voters that means that many people over 18.

Mr. Owens: Yes, Your Honor, but I think there is a little difficulty there. They know that there are some people who maybe have moved away but have not registered in another [80] county and therefore their names have not come off the list. They may not have used that individual's name.

Judge Bell: How many—

Mr. Owens: —About 2000 on the list.

Judge Bell: I saw somewhere, I thought, Mr. Moore, where there were more Negroes voters than White in Taliaferro County, registered to vote.

Mr. Owens: It was an allegation, I think, made by the Plaintiffs.

Judge Scarlett: I noticed that in the papers, in one of the Savannah papers.

Judge Morgan: It is alleged in his petition.

Mr. Owens: It is alleged in his petition, Your Honor. We show the population. In the 1960 Census, Your Honor, which I have a copy of—

Judge Bell: —Well, you have got 1172 Negroes registered to vote and 1063 Whites. That's 2231. How many people in the County—three thousand and what?

Mr. Owens: 3,370, Your Honor.

Judge Bell: 3,370. Well, that would be a pretty good average, I would say, out of the voters.

Mr. Owens: Mighty good average.

Mr. Moore: Your Honor, we have a study that was made that shows—

Mr. Owens: Whose study is this now?

[81] Mr. Moore: Southern Regional Council.

Judge Bell: What is it about?

Mr. Moore: It is through 1960, purporting to show the number of registered voters in Georgia counties, and for Taliaferro County they list Whites' voting age population as 917, and Negro voting age population as 1073. White registered 1052. Negro registered 1,165.

Judge Bell: In other words, you have got more registered in each case than there are people in the county?

Mr. Moore: Yes, sir. This is for 1960, or through 1966.

Mr. Owens: What's the source of that information?

Mr. Moore: The Southern Regional Council.

Mr. Owens: But where did they get those figures is what I want to know?

Judge Bell: Well, they can get them from Ben Fortson's office, the number of registered voters, that is all that is.

Mr. Owens: The number of people of voting age, Your Honor.

Judge Bell: Well, you can get that out of the census.

Mr. Owens: Yes, sir.

Judge Bell: That's not significant. Now, we will close off the Grand Jury part of the evidence now. Now, Mr. Owens, do you have some fact that you want to get stipulated?

Mr. Owens: May it please the Court, right at the moment we do not.

[82] Judge Bell: Mr. Moore, do you know of anything else that you want to stipulate? I know you have got some evidence you want to offer.

Mr. Moore: Yes, sir.

Mr. Bloch: I sorta want to see where we are.

Judge Bell: Well, let us do this, let us take a ten minutes recess and that will give you—

Mr. Bloch: —I would like to ask the Court this question; I wrote it down and I think it is right important: Is the Court preparing now to hear this case on the basis of an application for a preliminary injunction, subject to a ruling on all motions and a right for us to file our answer thereafter as provided by the Rule, is that a correct statement?

Judge Bell: Well, we don't know yet. We haven't got to that point.

Mr. Bloch: I see.

Judge Bell: If we can't get counsel to agree to let this be—to let the case be submitted for final hearing on the merits we will have to come back over here later on and have another hearing. That is what we want to talk about when we get back. We are not quite to that point yet. The Court will take a ten minutes recess.

The Marshal: Take a ten minutes recess.

(Note: At this point a recess was then had from 11:25, A. M., until 11:35, A. M., of the same morning at which time the proceedings were resumed as follows on the next page.)

[83] Judge Bell: All right.

Mr. Owens: Does the Court desire to receive the facts that the Court asked about?

Judge Bell: Yes, sir.

Mr. Owens: May it please the Court, with reference to Mr. Horace Hill, his children are all grown. Mr. Moore Pittman, his children are all grown. Mr. Larry Beazey has no children.

Judge Bell: Wait a minute. Pittman—

Mr. Owens: His children are grown.

Judge Bell: And Beazey has no children?

Mr. Owens: That's correct, Your Honor.

Judge Bell: All right.

Mr. Owens: Now, Mr. Chapman, I stated that he had never had any children. As I understand it, his children are grown and married. I was wrong on that, Your Honor.

Judge Bell: Now, what I am getting at, do any of these folks have any grandchildren going to this private school?

Mr. Owens: I will have to ascertain that. I have not attempted to go that deep into it, Your Honor. Mr. Cranstons Jones, the individual whose child goes to school in Jonesboro, as I understand it the child has moved to Jonesboro and resides in Jonesboro with relatives.

Judge Morgan: In Clayton County, Jonesboro, Georgia?

Mr. Owens: And Mr. Horace Williams has now taken up residence in Greene County and his child goes to the Green County [84] School, Your Honor.

Judge Bell: Well, find out if any of these people have grandchildren going to a private school. It is sorta like an absentee landlordism or something to have an all white school board for an all Negro school and the white school board members families going off somewhere else to school.

Mr. Owens: All right, we will check into that, Your Honor.

Judge Scarlett: And it is also unusual for the grand parents to have the children, isn't it?

Mr. Owens: Well, yes, sir. Now, with reference to the Tax Digest, Your Honor, the old Tax Digest before re-evaluation was one and a half million dollars.

Judge Bell: All right.

Mr. Owens: And these are all rough figures, Your Honor, from Tax Commissioner Hill, she doesn't have the exact figures.

Judge Bell: All right.

Mr. Owens: The new Digest is Four point Seven Million Dollars.

Judge Bell: All right.

Mr. Owens: The old levy was 35.24 mills.

Judge Bell: That's the total there. All right.

Mr. Owens: That's correct, Your Honor. The new levy is 18.05 mills.

Judge Bell: All right, what was the school board levy, the old?

[85] Mr. Owens: I only got that in dollars, Your Honor.

Judge Bell: No. I mean how many mills do your school board levy? Fifteen before and now Seven and Three-quarters.

Mr. Owens: I think, Your Honor, the question was whether during the last five years the school board had gotten more than \$39,000.00.

Judge Bell: Yes.

Mr. Owens: The figures \$39,000.00 except last year, when it was around 41 to \$42,000.00. I don't have the exact figure.

Judge Bell: 1967?

Mr. Owens: Yes, sir, the last tax years.

Judge Bell: Now, what's the \$39,000.00? Where does that get in? I thought that was for last year.

Mr. Owens: It has been at that figure every year, Your Honor.

Judge Bell: Up to 41—it has gone up now?

Mr. Owens: I don't know whether these figures are on a calendar year or school year.

Judge Bell: Ask Mrs. Williams.

Mr. Owens: When the state re-evaluated the public utilities it caused the change.

Judge Bell: All right, I see.

Judge Morgan: In other words, there has been no reduction in the amount collected locally—

Mr. Owens: That's correct, Your Honor.

[86] Judge Morgan: —And the reduction was caused by this Public Service Commission reducing the valuation on the public utilities.

Mr. Owens: That's correct, Your Honor.

Judge Morgan: All right.

Mr. Owens: And we will check into the grand jury.

Judge Bell: All right. Now, Mr. Moore, suppose you put your—well, wait just a minute. Mr. Evans has got a chance to say something. Do you want to argue anything about these statutes now, or do you want to wait until later?

Mr. Evans: Whatever the Court prefers. They will match in with the Three Judge Court, may it please the Court.

Judge Bell: Well, that's right, one of them is a freeholder argument and the other one is whether or not these statutes are so vague on their face—

Mr. Evans: Well, there is a federal attack in the petition, of course, including one that appears to be the contention that you cannot appoint the school board, that they must be elected.

Mr. Evans: That's been ruled on, as Your Honor knows in Wallis Against Blue in the Northern District—

Judge Bell: —Well, you need not argue that.

Mr. Moore: Well, that's reading into the petition, he—

Judge Bell: Well, they might have gotten that from [87] newspaper. Somebody has been putting it in to the newspapers.

Mr. Evans: Of course, the petition is perhaps a denial of our due process because of its vagueness. What appears from the petition they are attacking the fact that the board is elected and also in the brief they get into points about electing or appointing.

Mr. Moore: That's really running the robin around the tail. He made some off statements that we were attacking this thing on the basis of Wallis Against Blue, that you couldn't have an election appointing the school board members. We are not attacking that. We are attacking the fact that this is an election and we have been fenced out of it.

Judge Bell: That is what I understood his theory of it is. What do you have to say about the qualifications set out in the statutes? Are they in the statute or in the constitutional?

Mr. Evans: Both, Your Honor.

Judge Bell: One being that a man must be a supporter of public education, whatever that is.

Mr. Evans: Your Honor, if we will take them one at the time. The freeholder requirement is in both the constitution and in the statute. I start out by saying that I suspect this is probably historical vernacularism and probably stems from the days of "substantial people", people who might have an interest in community work, generally speaking, owners of realty.

Judge: Well, it was after the pre-revolutionary days [88] when you not only had to be a freeholder, but you had to own a certain amount of property to be allowed to vote.

Mr. Evans: Yes, sir.

Judge Bell: And there has been a gradual change in history in requirements since that time.

Mr. Evans: Yes. Today the usual requirement is that if a person handles money he must post bond. This is the normal way of handling it. However—well, I, myself, might question the wisdom of this requirement, I don't have to justify it as far as being wise. All I have to do is to point out to the court—

Judge Bell: —Whether or not it is constitutional?

Mr. Evans: Right.

Judge Bell: That is the only thing we are interested in.

Mr. Evans: Yes, sir. I think that it is constitutional. Generally speaking, of course, to start with the Legislature subject to the initial right of the people to set qualifications in their constitutional, which they have done, establish any reasonable qualification that may be proper. So far as I have been able to discover the courts have always, in the absence of constitutional inhibition, upheld property qualifications. State court decisions would be such as DeCrab Vs Strover, 287 New York State, 22. That's 1936.

Judge Bell: Have you got a federal decision?

Mr. Evans: Yes, sir, the closest thing we have on [89] the federal is the United States Supreme Court Decision is Vought Vs Wisconsin, it's 217 U. S., 590, in 1910. There the Wisconsin statute required Jury Commissioners to be freeholders, and this was attacked by persons who had been indicted on the grounds that it violated their rights under due process and equal protection clauses in the freeholder requirement. The Supreme Court thought that the federal question was so clearly insubstantial as to dismiss the case on jurisdictional ground. In summary, I think that the compilers of law in 42 AM. Jur. Public Officers, Section 49, are clearly correct when they say: "Undoubtedly a Legislature has the power to impose a property qualification upon office holders." This is the law to date. Of course, we all know that we are in an area which is moving here, and whether this court is going to take it upon itself to change the law, I can't say.

Judge Bell: Well, there is one thing that would be very pertinent and that is a substantial number of Negro freeholders in this county.

Mr. Evans: Well, sir, also this would get into a standing question in as much as Mr. Turner has stated—

Judge Bell: You could argue that this was reconstruction statutes designed to exclude Negroes from public offices and that was a good way to go about it. Of course, there weren't any freeholders—I don't know if they have argued that. I think probably that might be one of the arguments—but if times have changed, the economics of Taliaferro County has changed over the year where [90] there are a good many Negroes that own property, then it might be a perfectly reasonable thing, at least you couldn't say that it was a scheme and device to keep Negroes out of office.

Mr. Evans: Well, no, sir. In the first place, it applies equally to all people regardless of race.

Judge Bell: I know, but suppose there weren't any Negro freeholders and you had such a law, you know that wouldn't stand up.

Mr. Evans: Your Honor, there is a very easy way of getting around that. You could buy one acre of useless property and subdivide it into one foot square and give one to every person and they all have one square foot of property. That is not really a substantial argument.

Now, as far as vagueness, most words and virtually all sentences and certainly every paragraph of any Code where constitution is vague to some degree. I think the epitome of vagueness is probably in the Fourteenth Amendment where they have such monstrosities as due process and equal protection, whatever that may mean.

Judge Bell: Well, you know what equal protection means but it is hard to know what due process is.

Mr. Evans: Now, as far as—I confining the vagueness here. As far as phrases like good moral character is true,

they are to an extent vague but we hang people because they have "good or bad reputation in the community", and the courts won't even [91] let you give examples. You have to say that he has a good general reputation. We hang people because of that. Now, as far as good moral character, what they are trying to do in all of these qualifications is give the selecting body—we have various levels attacked here—but when it comes to the selection of the school board, they tried to give them a guideline, to try to get the better people in the community, the more intelligent, the best people you can to serve on it. Now, is that really bad? I can't imagine that this court will hold that is bad faith in trying to get the best people possible on the board. This, of course, is one of the questions. I think facial constitutionality of all of these statutes is so obvious there is no substantial question and it should be remanded to a single judge court under both Langsford, and also one the court decided this very past year by the United States Supreme Court in *Moody Vs. Flowers*, where they state the officer sought to be enjoined must be a state officer. A Three Judge Court may not be concerned when the action seeks to enjoin a local officer unless he is functioning pursuant to state wide policy in performing a state function. Here we are talking about the actual grievance, the action complained of. Way back in the thirties in *SOUTHERN Vs the United States*, 316, U. S., 46. They point out that it is not a Three Judge Court situation where the evil complained of is one which could not possibly be said to authorized by a federal statute.

Now, let's look at some of these statutes. In the Jury [92] selection statute there is an affirmative mandate to go out in the community and try and get members of identifiable groups. Now, certainly, if some one is discriminat-

ing against Negroes, that is acting under that statute, under color of it, could not possibly be said to be authorized by it. It is quite to the contrary. It's a flagrant violation of the Georgia law. There is nothing in these statutes that has any built in racial discrimination, and therefore we think under Blanford that the case properly should be remanded to a single judge court.

Judge Bell: Well, now, just putting race aside. If the statutes and the constitutional provision is unconstitutionally vague in the area of setting qualifications for school board members then you would have a Three Judge District Court.

Mr. Evans: No, sir.

Judge Bell: You haven't argued anything but good moral character. There are a few more grounds, a few more qualifications.

Mr. Evans: I believe Your Honor has just made a mistake though.

Judge Bell: All right, where?

Mr. Evans: You stated, as I understand it, if they are vague this is necessarily a ground for saying that it is unconstitutional. Such is not the case.

Judge Bell: I said unconstitutionally vague.

Mr. Evans: But the point here is that if these statutes [93] or these standards can be interpreted more than one way, which they undoubtedly can, any standard can, otherwise you wouldn't have courts, if you couldn't interpret statutes and—

Judge Bell: Now, just address yourself to the qualification that you have to be a supporter of education. Read that out, whatever it is.

Mr. Evans: It states "And be favorable to the common school system." I think perhaps it is a nice idea—

Judge Bell: —Now, what does that mean?

Mr. Evans: It means that the person basically is not opposed to the concept of public education. I think probably it is a desirable thing to have men on the board who are not opposed to public education.

Judge Bell: It doesn't say "not opposed to it." It says "to be favorable to it."

Mr. Evans: Well, you are taking one side of the coin. I think it is the same thing.

Judge Bell: Well, I am taking the language in the statute.

Mr. Evans: Yes, sir.

Judge Bell: It says to be favorable to it.

Mr. Evans: Right.

Judge Bell: Now, let's take this school board. We have got five people on the school board and none of them have children of school age. Don't you think that would militate against the idea that they were favorable to public education?

[94] Mr. Evans: No, sir, I think, with all due respect—

Judge Bell: —You have got one who has never had any children.

Mr. Evans: With all due respect to Your Honor, I think the argument is non-secretive. I think it is quite possible for a person who favored the concept of public education to want to have a good public school system and yet, for various reasons, because his child is exceptional, because of various reasons wants his own child to go to a private school. I can see this very well. I could, myself, favor public education, if I had the money I might say that in spite of it I want to do the best job I can to operate schools, well, in my case, Fulton County, that I might prefer to send my child to a private school. The two are not inconsistent,

therefore I submit that Your Honor's argument is non-secretive on that point.

Judge Bell: —Well, I don't know what my argument is. I am trying to find out what that means. That is all I am interested in. You see, I am not here to argue with you. I want you to tell the Court just what this means. If you were on the Grand Jury and you came to select a school board member and you took the constitution and you said "Now, what are the qualifications"? And this is one of them.

Mr. Evans: Right.

Judge Bell: What would that mean to you? How would you go about performing your duty as a Grand Juror?

[95] Mr. Evans: Well, first of all, I would want to know—and I did give Your Honor one side of the coin; that he is not opposed to the concept of public education and that he is not neutral to it, that he favors it. Now, to me this is as clear as anything can be. I don't see anything vague about that.

Judge Bell: Does it say public education?

Mr. Evans: Yes, sir. It says favorable to the common school system which has judicially been interpreted by the Courts of Georgia over and over as meaning the public schools.

Judge Bell: Do you think that is now freighted with the idea of a segregated common school system?

Mr. Evans: Your Honor, certainly not.

Judge Bell: You don't think so?

Mr. Evans: No, sir.

Judge Bell: You don't think it could mean that a member of the board of education had to be favorable to a de-segregated common school system?

Mr. Evans: Yes, sir. I think it means that he is favorable to the public school system within the limits of the law. I don't imagine the Grand Jury goes and interviews them about the import of Brown and all the technicalities of the law.

Judge Bell: They have got to be favorable to everything that's in the law.

Mr. Evans: Yes, sir. And the Courts are here to prevent [96] him from doing something not within the law. That is a wholly different subject matter. That's application. That has nothing to do with the facial validity of the statute. I say that the standard is reasonably clear.

Judge Bell: Well, that's the whole thing. Is it clear? What does that mean to a Grand Juror when he comes to perform his duty? Does the Grand Juror get out of that; that they ought to appoint somebody who is favorable to common schools, common schools meaning desegregated common schools?

Mr. Evans: I would say, basically, and I am trying to put myself in the position of a Grand Juror, I would look at "Does he favor providing free education." That is what I would say.

Judge Bell: All right. What's the other qualification?

Mr. Evans: The other qualification was a fair knowledge of the elementary branches of the English education.

Judge Bell: What do you think that means? Put yourself in a Grand Juror's seat—

Mr. Evans: —I will be glad to.

Judge Bell: All right.

Mr. Evans: I think that this—of course, I would first of all look at it historically, our basic, the substance of education we have, not procedural, it comes from England; we teach English History, we teach American History, we

teach English, we teach math, and I would say that basically you would want some one who was not a complete clod on the board, you would want some [97] one who at least has a semblance of the English education.

Judge Bell: Have you examined the qualifications of these school board members?

Mr. Evans: No, sir, I have not. I am not on the Taliaferro County Grand Jury.

Judge Bell: Do you think they have learning in the elementary branches of the English education?

Mr. Evans: No, sir. I am not on the Taliaferro County Grand Jury, so it is not my prerogative.

Judge Bell: Do you think that a Grand Juror would know just what this means, so we could select a man?

Mr. Evans: Yes, sir, I think he would take that to mean that the person is reasonably intelligent and has at least some education.

Judge Bell: It doesn't say that.

Mr. Evans: I think that is what you would take it to mean.

Judge Bell: Well, maybe he might take it to mean the wrong thing. It doesn't say that.

Mr. Evans: Well, Your Honor—

Judge Bell: —Read it out again.

Mr. Evans: "A fair knowledge of the elementary branches of an English Education."

Judge Bell: I really don't know what it would mean, but I thought maybe you did.

[98] Mr. Evans: Well, Your Honor, of course, the answer to that—

Judge Bell: —You are sort of an expert in this area of the law.

Mr. Evans: I would like to go one step further. All of this, even though it is acceptable of many interpretations it is not a constitutional definitive under *Screws vs. United States*, 325 U. S. 91. Here the Court said: "The statute—" No, it pointed out that it is the duty of a court, where the statute is vague and ambiguous, to supply the standard. It is only where the statute is incapable of interpretation and—

Judge Bell: —Wait a minute. What is that decision?

Mr. Evans: *Screws vs. United States*, 325 U. S. 91. Where they said a statute will be held null and void for lack of sufficient clarity to meet due process requirements "only where no possible construction can be made by the Court to save it."—

Judge Bell: —You say 323?

Mr. Evans: 325 U. S. 91, and particularly page 100.

Judge Scarlett: That last paragraph you stated, read that again, that last paragraph you just stated. Only—what?

Mr. Evans: "Only where no possible construction can be made by the Court to save it." Therefore, I would suggest that if the Court feels this language is a little bit vague it should, in its decision, say that "we interpret this as meaning", and [99] therefore say that as far as being constitutional—of course, this is a basic rule, the Court does not set out to destroy statutes by declaring them unconstitutional. It is our place to preserve their constitutionality—

Judge Bell: —All right, now, we are at the cross roads. Suppose we construe that statute and we find that some of these people don't meet the qualification on the school board.

Mr. Evans: The proper remedy there would be quo warranto proceedings, I presume, in the state courts.

Judge Bell: You think we ought to relegate these people to that, if we should find that some of them don't meet the standards.

Mr. Evans: I think it is proper. If there is a person unqualified serving on any board in the State of Georgia—I have no particularized information as to this school board—I presume that all members meet their qualifications. I believe there is a presumption to that effect. However, in any school board in the state, if a member lacks qualification because of age, citizenship or being a registered voter the proper procedure is to file quo warranto proceedings in the state courts. I think the federal courts would normally tend to grant the state courts the first whack at it.

Judge Bell: Well, if this is a serious question, if it is debatable, arguable question, then they are entitled to have a Three Judge District Court.

[100] Mr. Evans: No, sir. This is only a faulty application by local officials, if this was so, and I say "if".

Judge Bell: No, if the statute is vague to this extent. We can't rule if it is not vague—

Mr. Evans: —I think that—

Judge Bell: —And in the same breath say that it is so frivolous that they are not entitled to a Three Judge Court here.

Mr. Evans: No, sir, but I think the proper ruling is that the vagueness question is so frivolous that it is not a Three Judge Court matter. I mean it is not that vague. I mean it sets a general standard, a flexible standard. What it is trying to do, in essence, is to get people who have some education, get people who have a good reputation and—

Judge Bell: Suppose you file a brief and tell the Court what you think these qualifications mean that seem so plain to you, that a man is learned in the elementary branches of the English Language. You tell us what that means, and then you also tell us what you think it means to be favorable to the common school system, whether or not that means favorable to a desegregated school system, or a common school system in the days—or the way it was in the days when that was passed.

Mr. Evans: All right, sir.

Judge Scarlett: That last paragraph covers, I think—

Mr. Evans: Well, if it wasn't it would be up to the [101] court to fill in the meaning.

Judge Bell: Well, I think you ought to file a brief.

Mr. Evans: Well, it will be about a two page brief, because as I tried to explained—

Judge Scarlett: —That's the kind we like.

Mr. Evans: Well, it will be about that, because to me it means favorable to the common school system, it means one favors a system of public education being available for all citizens of the county. I don't think it really gets into the question of whether it favors a segregated system or not, but I think it is quite possible that a man could favor a segregated system and be on the school board.

Judge Bell: How in the world could he be? He would close the schools.

Mr. Evans: No, sir, not at all, because you are saying, frankly—

Judge Bell: Well, I tell you, you file a brief and give us your views about it, because you are getting so mixed up.

Mr. Evans: No, sir, I am not mixed up.

Judge Bell: Well, if you favor the common schools in 1968, that means that you would have to favor a desegre-

gated school system, or an integrated school system. If you don't favor that, then you can't be on the school board.

Mr. Evans: No, sir. It doesn't mean you favor, it means that you are willing to accept it in accordance with the laws.

[102] Judge Bell: I am just telling you what the constitution of Georgia says. I didn't write the constitution. I am just telling you what it says. You will have to live with that. It is not up to us to worry about. You file whatever brief you want to file on this.

Mr. Bloch: Your Honor, right on that point, perhaps those qualifications which were set out in the Code section, which was originally passed in 1919, apparently, at the time when the constitution of 1877 was in force. The constitution of 1877, prior to the amendment of 1912, provided this:

"There shall be a fair system of common schools for the education of children in the elementary branches of an English Education only as nearly uniform as practical. The expenses of which shall be provided for by taxation or otherwise."

Now, by an amendment ratified October 2nd, 1912, the words "In the elementary branches of an English Education only", were stricken, so the section prior to the adoption of the constitution of 1945 and at the time of the passage of the Act of 1912 embodied, most of which, is embodied in this Code Section, the constitutional provision headed "Common Schools", read: "There shall be a thorough system of common schools for the education of children as nearly uniform as practical. The expenses of which shall be provided for by taxation or otherwise."

Now, it seems to me—

Judge Bell: They just didn't change that section of [103] the constitution and that statute about the elementary branches.

Mr. Bloch: That's right.

Judge Bell: When they changed it in—

Mr. Bloch: They changed it in another. It seems to me that phrase "favorable to a system of education" should be read in the light of the constitutional provision.

Judge Bell: Well, it would be a simple matter, it seems to me, to go to the library and find some writing on education at that time which would define what they mean by an elementary system of English Education.

Mr. Bloch: I think they were getting rid of the old theory of reading, writing and arithmetic.

Judge Bell: Right. Mr. Evans can find that over there in the State Library. I think he can get that up for us, and tell us about that in his brief.

Now, suppose we let Mr. Moore put his evidence on now.

Mr. Bloch: Your Honor, can I be heard from right there?

Judge Bell: All right.

Mr. Bloch: I have been bothered about it ever since Your Honor posed the question you did, or rather I posed the question and Your Honor said you were going to take that up after recess. I preface what I have to say by saying that Your Honor knows and the other Members of the panel know that I want to convenience the Court just as much as I possibly can.

Judge Bell: We know that you have not filed an answer.

[104] Mr. Bloch: We have not filed an answer.

Judge Bell: All right.

Mr. Bloch: Here is the situation: I think this suit was filed and was served on us on the 27th of November. We were engaged a few days afterwards and I had to hurry in order to get up what pleadings I did get up and I thought that I could and did conscientiously file the motions that were filed which I supported with a brief. Now, we came

over here this morning, having filed that brief some days ago and served it some days ago, without having heard a word from opposing counsel in response to it, and we came here without knowing just what we were going to do. We came here because the case was set for the 23rd—

Judge Bell: —And you have not yet had a chance to read what he filed?

Mr. Bloch: Have not yet read what he has filed, haven't had a chance to read what he has filed, and if you will bear with me about five minutes, let me show you how important it is to proceed in a little different sort of way. Now, our motion under 12(e).

“Comes now the defendants and show the Court and moves the Court for a more definite statement. The defects complained of and the details desired are: (1) In paragraph 3 of the complaint it is alleged that certain of the defendants are Members of the Grand and Traverse Juries of Taliaferro County, Georgia. With respect to this allegation defendants desire that plaintiffs [105] allege when and at what terms of court W. W. Fouche, Rastus Durham and Elmo Bacon were Members of the Grand and Traverse Juries of Taliaferro County.”

I don't attach much importance to that because I could go find out.

Judge Bell: All right.

Mr. Bloch: Second, in paragraph 4 of the complaint it is alleged that certain of the defendants are Members of the Board of Education of Taliaferro County, Georgia, chosen for the positions by the Grand Jury. Now, with respect to this allegation I can lay that to one side because I can go find out.

Now, listen to this one, though. In Paragraph 11 of the complaint it is alleged that the defendants have chosen

and threaten to continue to choose an all-white school board to superintend the all-black public schools of Taliaferro County.

With respect to this allegation defendants desire that plaintiffs allege which of the defendants made the alleged threats, to whom, when and where. Now, I think that is important for us to know that.

Judge Bell: It wouldn't be important at all if they don't prove that. It would fail for want of proof.

Mr. Bloch: Except for one thing, Your Honor—

Judge Bell: —You don't want to prove a negative, do you?

Mr. Bloch: I am going into these damages.

[106] Judge Bell: All right.

Mr. Bloch: And 4, Your Honor might make the same response here:

"That the policy, custom, practice, and usage of the defendant school board has been such as to deprive the plaintiffs and members of their class of textbooks, facilities, laboratories, recreation facilities, teaching programs", and so forth.

With respect to this allegation defendants desires that the plaintiffs allege which of the defendants so deprived the plaintiffs, as alleged, when such deprivation occurred or what the deprivation consisted and how and in what manner it was consummated.

Now, I respectfully suggest, Your Honor, that Your Honor's suggestion to the preceding one doesn't exactly solve the problem and certainly it wouldn't this, because when they set it up we have got to know who to bring to court to disprove it.

Judge Bell: Well, if they agree that today is a final hearing, and we don't plan to ask them that until they finish putting their evidence on, that's reason I told you earlier that later in the day we will decide what to do with the case. It may be that we will continue it, or it may be that we will strike the damages. We just don't know that now until they get through putting their evidence on.

Mr. Bloch: Well, why couldn't that problem be solved [107] just as well by confining this hearing on a motion for a preliminary injunction?

The Court: Well, because it saves valuable judicial time if we can get the whole case in today. I know you are not interested in that but we are.

Mr. Bloch: Yes, I am too.

Judge Bell: We have got so many cases we just can't spend all of our time working on the Taliaferro County case.

Mr. Bloch: I am interested in that. Of course, I am interested in the Court's time.

Judge Bell: I have seen a lot of these Civil Rights cases. I have been in a lot of them in several states and I find that usually by the end of the day everybody has got everything in the record that they want to get in and everybody will say "Well, let's just have a ruling now and treat it as a final hearing." I can understand, if somebody was trying to get Five Hundred Thousand Dollars damages from me I would be worried.

Mr. Bloch: And not only that, Your Honor, I think this is such a case of great importance, a case of great importance, that we ought to proceed right down the line according to the rules, and I mean by that—

Judge Morgan: What did you file, a motion for a more definite statement?

Mr. Bloch: All the motions, and then we will save time and proceed according to the rules of law if Your Honors [108] would see fit—

Judge Bell: Well I tell you, Mr. Bloch, we would be here about a week if we proceeded in a normal manner, and there is just no sense in spending a week on this case. Now, from just reading these things, that's what we have done this morning, and we know just about what this case is about. Now, we have got to devise a procedure that won't take a week.

Mr. Bloch: I understand, and I am going to help you do it.

Judge Bell: You let the plaintiffs put their evidence on and they will probably complete their record and at that time we will make a decision as to whether or not—you may not even want to put anything on, but we will wait and see about that, so you just let us go ahead like this for a little while and then we will hear from you again. We don't mean to cut you off, but we are not going to hear this case today as a motion for a preliminary injunction and come over here a month from now and hear some other part of it.

Mr. Bloch: I wasn't going to suggest that. I was going to suggest—I heard you set a case down in Brunswick for the 23rd and I was going to suggest that after Your Honors have ruled on the various motions and then if it became necessary for us to file an answer that we file it and embody in the answer just what has been uncovered here before the Court this morning and if there is any further hearing necessary that we have it [109] at the same time down there in Brunswick.

Judge Bell: Well, we may do that, but we don't know that now.

Mr. Bloch: I am frank with the Court, and the thing that I am particularly bothered about is the attitude about these damages. I had a chance during the ten minutes recess to glance at that brief and I see where they are contending that Your Honors have the right, sitting as a Court of equity, to award ancillary damages. Now, I haven't had a chance to read all those cases that they cite. I don't know what they hold.

Judge Bell: Well, we are not going to award any damages today, if that will make you feel any better.

Mr. Bloch: Well, I hope you never award them, but I just think the case ought to proceed after you have ruled, whether or not—

Judge Bell: —If we were living in a time when we didn't have many cases I would agree with you and I would enjoy staying over here in Augusta and I know that Judge Scarlett and Judge Morgan would, but we have got something to do tomorrow and the next day, and we have just got to make as much progress as we can everyday, so today we are going to hear this evidence and at that point we will hear from you again and we will decide what we ought to do about it. We don't want to take advantage of you in any way, and I don't think we are.

Mr. Bloch: Just so it is without any detriment to any [110] of our pleading rights.

Judge Bell: That's the way we are proceeding. We don't intend to deny anyone procedural due process.

Judge Morgan: Did you take any discovery after you were served on the 27th of November.

Mr. Bloch: Sir?

Judge Morgan: Did you utilize any discovery rules after you were served on November 27th?

Mr. Bloch: I can't hear you, Your Honor.

Judge Morgan: Did you utilize any of the federal discovery rules after you were served on the 27th of November?

Mr. Bloch: No, sir. What happened then, you see, we had the fundamental proposition that it was not a case for a Three Judge Court, nor a class action. Before we could talk about discovery rules they filed some interrogatories and requests for admissions which covered almost everything that we would have put into our answer. We did not utilize any discovery rules, take the deposition of Calvin Turner.

Judge Bell: All right, Mr. Moore, lets put your evidence on.

[112] CALVIN TURNER, sworn for the plaintiffs, testified.

On Direct Examination by Mr. Moore:

Q. Mr. Turner, you have been sworn? A. Yes, sir. I have.

Q. Will you state your name, please? A. My name is Calvin G. Turner.

Q. Are you a resident of Taliaferro County, Georgia? A. I am.

Q. How long have you been a resident of Taliaferro County? A. All of my life.

Q. And how long has that been? A. 35 years.

Q. Is your father a resident of Taliaferro County? A. He is.

Q. And how long has he been a resident there? A. Oh, I think for about 52 years.

Q. And your grandfather? A. For 85 or 6 years.

Q. And that is Mr. Joe Morris Turner? A. My grandfather is Mr. Joseph Turner.

Q. And he has always lived in Taliaferro County? [113] A. He has.

Q. And is he alive today? A. He is in this courtroom.

Q. Are you a member of the Negro race? A. I am.

Q. And you are the plaintiff in this case? A. I am.

Q. Do you hold any office in Taliaferro County, any unincorporated association? I will ask you this, are you connected with the Taliaferro County Voting League? A. I am.

Q. And what is that connection? A. I am the Consultant for the Taliaferro County Voters' League.

Q. And how long have you been the Consultant for the Voters' League? A. For about three years.

Q. Prior to becoming Consultant for the Taliaferro County Voters League, were you connected with the Taliaferro County School System? A. I was. I was once a teacher in the Taliaferro County School System.

Q. And how long were you a teacher? A. Two school years.

Q. And you have lived all of your life in Taliaferro [114] County? A. I have.

Q. Are you familiar with the Negro citizens of Taliaferro County? A. I am.

Q. Have you conducted surveys and other things to determine the number of Negro registered voters in Taliaferro County? A. We have.

Q. Are you familiar with the white people in Taliaferro County? A. I am.

Q. I hand you Plaintiff's Exhibit P-1, which is a list of the Grand Jurors for Taliaferro County for 1967 and ask you to state whether or not you have seen that list before? A. I have seen it before.

Q. And where did you see it? A. I saw this list first in the Advocate Democratic, a Local County Newspaper.

Judge Bell: Is that a list of the Grand Jurors, or all Jurors?

Q. Is that a list of the Grand Jurors? A. Grand Jurors.

Q. And also a list of the Traverse Jurors for the year 1967?

[115] Judge Bell: Well, now, just on the matter of procedure, I want to see if our understanding of the Georgia Law is correct on preparing a Jury list. You prepare a Master List, as I understand it, and then you take two thirds of the names on that list and make a Grand Jury list.

Mr. Owens: Two fifths.

Judge Bell: Two fifths, and leave Three Fifths on the Traverse Jury list?

Mr. Owens: It would be three fifths traverse—on the Traverse Jury List that are not also on the Grand Jury list. There is an overlap there, Your Honor.

Judge Bell: I see. Now, you have got the two lists separated here. This is a separation of the overall Master List.

Mr. Owens: May it please the Court, to clarify the situation these are lists that were furnished by the defendants as being certified copies of the present list of Traverse Jurors as certified by the Clerk of the Superior Court.

Judge Bell: Let Mr. Moore see it.

Mr. Owens: I gave him copies.

Judge Bell: All right.

Mr. Owens: And likewise a copy of the Grand Jurors. We have furnished these to him.

Judge Bell: All right. Give those to the Clerk.

Mr. Owens: They may be given to the Clerk and so identified.

Judge Bell: Mark those and put those in evidence.

[116] Mr. Moore: This is a copy, Your Honor. There are two documents, Plaintiffs' Exhibit 1, and the first two sheets being the Grand Jurors for 1967, and the second three sheets being the names or a list of the Traverse Jurors.

Judge Bell: All right, lets mark that Plaintiffs' Exhibit No. 1.

Mr. Moore: Number 1, yes, sir.

Judge Bell: Now, is that the same list that Mr. Turner has over here in front of him?

Mr. Moore: Yes, sir, it's a photo-copy.

Judge Bell: That's the one he is going to testify concerning it?

Mr. Moore: Yes, sir.

Judge Scarlett: Aren't you going to file them?

Judge Bell: That will be admitted into evidence.

Mr. Moore: I want to substitute this for—

By Mr. Moore:

Q. Mr. Turner, I believe that the document that I am handing you now, Plaintiff's Exhibit No. 1, is the document that you saw rather than this photo-copy, is that right? A. From just looking at them, they look generally the same. I haven't had time to see them.

Q. Did you do anything to the list? A. This list—

Mr. Owens: —May it please the Court: May we inquire as to what the relevancy is of a list that he was shown that was [117] in the paper and prepared the list before the Court?

Judge Bell: Well, let Mr. Turner answer that question first.

Q. Mr. Turner, did you do anything to the list? A. No, sir.

Judge Bell: No, he didn't ask that. He wants to know—you started off examining him about a list that he saw in the Advocate Democrat, I believe he called it.

Q. The list that you have there, Plaintiff's Exhibit P-1, have you seen it before? A. I have.

Q. Where?

Judge Bell: Where did you see it?

The Witness: I saw it—I have seen this list twice. Generally looking at it I think I saw it in the Advocate Democrat. I am sure that I saw this in Attorney Moore's office.

Judge Bell: All right. That was after you had filed it, Mr. Owens, no doubt?

Mr. Owens: Yes, sir.

Judge Bell: Now, before you ask him anything else, can we stipulate that this is the current Grand Jury and Traverse Jury List?

Mr. Owens: Yes, sir.

Judge Bell: In Taliaferro County?

Mr. Owens: Yes, sir.

[118] Judge Bell: And when was this list drawn or made? Does it tell that on the top of it? Lets see. In accordance with an order passed by Judge Stephens on the 3rd of April, 1967. All right. Now, you go ahead.

Q. Looking at Plaintiff's Exhibit No. 1, did you do anything to that list? A. I went through this list and pointed out all the Negro names that are listed.

Q. And did you put any mark on the list to indicate the names of Negroes? A. I checked every Negro name that on the Grand Jury and the Traverse Jury list that I knew of.

Q. Did you put a check mark by their names? A. I put a check mark by their names.

Q. How many persons did you find on the Grand Jury list who members of the Negro race? A. Looking here from what I have checked, I found eleven, I believe.

Q. The total of the Grand Jury is 130, is that correct?

Judge Bell: Is that correct, Mr. Owens?

Mr. Owens: I am not sure.

Judge Bell: All right.

Q. Now, I ask you to direct your attention to the Traverse Jury list, which is also a part of Plaintiff's Exhibit 1. [119] Did you check that list? A. I did.

Q. Did you put a mark on there to indicate the names of Negroes? A. I did.

Q. Did you know how many Negro persons you checked off as being members of the Negro race? A. If my calculation is right it was 56.

Q. 56 names? A. Right.

Judge Bell: How many total on the list?

Mr. Moore: 328, Your Honor.

Q. Did you make an examination of the Grand Jury list for 1967 to determine the number of women whose names are on there? A. We did.

Q. How many women are on the Grand Jury list? A. There is none on the Grand Jury list.

Q. All right, did you make an examination of the names on the Traverse Jury list to determine the number of women? A. I did.

Q. How many women did you find on the Traverse Jury list? A. I would have to examine my checks again.

Q. Would you do that, please? [120] A. My count is nine, nine women.

Q. Nine women? A. Yes.

Q. Does that include both the members of the Negro and the White race who are females? A. Only the Negro race.

Q. All right.

Judge Bell: How about whites?

Q. Could you look for the number of white ladies? A. It will take me a little longer in that I haven't checked them already but I could go right through it and do it.

Judge Bell: Well, I don't believe we will take time for that.

The Witness: Judge, if Your Honor please, there is one thing that might help me do it much faster is that all the white women are "Mrs." and "Miss", and that would be one way to identify them.

Mr. Owens: That is a conclusion, Your Honor. I know there are one or two that are Negroes.

Judge Bell: Look at the nine Negro women there, Mr. Turner, and see if they put "Mrs." or "Miss" by any name. Just look at your nine?

The Witness: Well, I have got to go through it like I did before.

Judge Bell: All right.

[121] The Witness: Judge, I can identify one Negro woman on this list as "Mrs."

Q. Who is that? A. Mrs. Doris Tellington.

Q. And the rest of the names that appear on that list as "Mrs." and "Miss", in your opinion, based upon your experience in Taliaferro County are white ladies? A. Right, sir.

Judge Bell: Do you plan to call any Jury Commissioners to testify? I want to find out, but not about this particular point, though this is a mighty small thing to do and to be put before a court for any county or for any public official to make such a distinction between people. They have got mighty little to do, whoever is responsible for it. It looks

like there are so many greater things on earth that ought to be attended to than to be wasting time like that. Either don't put "Mrs." or "Miss" before white people or put them before the Negro people too. That's an awful small thing.

Now, what I would like to know about is how you draw these Grand Jurors names out of the main list for service on the Grand Jury. Do you do that by lot, chance, or do the Jury Commissioners decide which of the Traverse Jurors will have a chance to serve as Grand Jurors? That's the big question. Either Mr. Owens you can put some evidence on, if you are prepared to do that today, that might be better than having Mr. Moore call somebody. I think we can get at it easier that way. All we want are the [122] facts. We don't care about any strategy or anything, so it maybe, Mr. Owens, if you don't want to do that, we can get Mr. Moore to call a witness or something. That is going to have to be developed. There is a certain disparity between the number of Negroes on the Grand Jury as compared to the number on the Traverse Jury.

Mr. Owens: May it please the Court, some of the Jury Commissioners are present and are available at the proper time.

Judge Bell: All right.

Judge Morgan: In other words, how were these eleven taken from the 328.

Judge Bell: All right, now what else?

Q. Now, Mr. Turner, I want to ask you about complaints of Taliaferro County parents to the school board. Do you have any knowledge of parents attempting to complain to the school board? A. I do.

Q. Now, can you tell the court what efforts the parents of Taliaferro County made to complain to the school board, what their complaints were, and when did they make overtures to the school board to present their grievances?

Mr. Owens: May it please the Court, we object to the way the question is worded on the ground that it is hearsay. He can ask what complaints he made or were made in his presence.

Judge Bell: That's right, he can testify as to complaints of his own knowledge. He can't tell about what he has heard, what some one else reported to him. Mr. Turner you tell [123] us of any complaints that you heard that were made in your presence.

Mr. Turner: May I ask, Judge, how far would I need to go back, and where should I start?

Judge Bell: I would say within the last two years.

Q. Start after we got the injunction in 1967.

Judge Bell: That's right, the last court suit.

Q. The school year of 1966-1967-68.

Judge Bell: When we wound this case up before over here, after spending all the time we did on this case before, we thought you were going to have peace in Taliaferro County and we would never hear of it again. I, actually, myself thought that there would be one or two Negroes put on the school board. It never occurred to me that you would run a black school system with a white school board. That's something the people have been complaining about all over the world for the last twenty years. It has

caused trouble everywhere. At any rate, we have another suit, so go ahead.

The Witness: If it pleases the Court, in an attempt, I believe it was in '65, that the Voters League of which I am a member had appointed committees to make attempt to meet with the school board to discuss grievances and we were never successful until maybe—

[124] Mr. Owens: We don't want to cut the witness off, but we suggest that he is not responding to the question. He is giving a dissertation on the Voters League and not enumerating a complaint.

Mr. Moore: Well, Your Honor—

Judge Bell: Just a minute, Mr. Moore. What he said is that he has never been given an audience where he could complain. That is what he has said so far, that the public officials of Taliaferro County haven't given him an audience so he could complain. I don't know what else he is going to say, but at least he has said that much. All right, Mr. Turner.

The Witness: And we had a problem really in trying to find out when, where and what time the board met, and we were able to find out a meeting date and hour in October, if I am correct it was in October of 1966, in which we went in, a committee went in to meet with the Board of Education and I think that committee consisted of some five or seven people.

Judge Bell: Were you present?

The Witness: I was not present on the scene.

Judge Bell: Well, wait a minute then. You can't tell about what happened if you were not there.

The Witness: All right, sir.

Q. Tell us about the time you went to the board yourself with persons trying to complain? A. I could never get into the Superintendent's office or to the Board of Education because we never knew when [125] they met.

Judge Bell: Did you ever try to get into the Superintendent's office?

The Witness: We did.

Judge Bell: I mean you personally?

The Witness: I did.

Judge Bell: In 1965?

The Witness: Yes, sir.

Judge Bell: How about since the court order?

The Witness: Not since the court order.

Judge Bell: All right.

The Witness: But I can say that it's a fact that I did write a letter to the Chairman of the Board of Education of Taliaferro County.

Judge Bell: Who was that?

The Witness: Mr. Horace Williams at that time.

Judge Bell: Who had his children in another school?

The Witness: Right.

Judge Bell: All right.

The Witness: I sent the letter by registered mail asking him to advise us as to a date and time of the Board of Education meeting.

Judge Bell: When did you write that letter?

The Witness: That letter was written after the October meeting because the members went and some few went in and they [126] were supposed to hear the grievances of the Committee and comply back to the committee—well, to the committee, well, this

never happened and after some two or three months we wrote back to the Board.

Judge Bell: What was the purpose of you writing the letter?

The Witness: Because I was a part of it.

Judge Bell: Well, the exception to the hearsay rule is to explain conduct. Why did you write the letter? Did somebody tell you they didn't get a hearing or something like that?

The Witness: First of all, I was a part of the committee.

Judge Bell: All right.

The Witness: That was appointed by the Voters League, and on the night that the committee went to see the Board of Education I was not available.

Judge Bell: All right, but you wrote a letter later on asking for a hearing?

The Witness: Right.

Judge Bell: What happened? Did you get any response?

The Witness: We got no response and I later called Mr. Williams over the 'phone, after he didn't respond to the letter, and he says to me at that point: "We have had our board meeting and I don't have nothing to tell you."

Judge Bell: All right, have you made any further attempt to have any communication?

[127] Mr. Moore: Was that October?

Judge Bell: No, he said that later, after the fall of 1966.

The Witness: That could have been in February.

Judge Bell: February of 1966?

The Witness: February or March, no later than March.

Judge Bell: Well, what were your grievances you were asserting?

The Witness: One of the main grievances was that there was no communication at all between the Board of Education, teachers and parents, and we felt, as Negro parents, that we couldn't do the best for our children when the parents could never set down and talk with the Superintendent nor the Board of Education and there was evidence of parents going to the school and being treated coldly.

Judge Bell: This was your grievance?

The Witness: Right.

Judge Bell: You wanted to meet with the Board of Education and discuss neutral problems. What would you have done when you got there if they had given you an audience?

The Witness: We would have discussed the problems that affected the Negro school.

Judge Bell: All right.

Q. What were your problems? What are those problems?

Judge Bell: Well, he just told us that. Is there any [128] more problems you want to tell about?

The Witness: We thought maybe that if the board gave us an audience, that if they were made aware of the problems that existed we could offer suggestions as to how we would remedy them. There were other problems that we were going to talk about but we thought the communication was the main one.

Judge Bell: All right, now, have you tried to obtain an audience with the school board since February, 1967?

The Witness: We have not. We haven't done it this year, this school year. We have not tried to.

Judge Bell: Not Mr. Williams told them there wouldn't any more to be said.

The Witness: Right.

Judge Bell: All right.

Q. Did you know that there were vacancies on the school board in 1967? A. I am not aware of it. I haven't been aware of it until it was mentioned in the court.

Q. There were vacancies in 1967? A. Right.

Q. Do you have any personal knowledge of the white children being able to leave the county and go over to adjoining counties to attend school? A. The question is do I have any knowledge?

Judge Bell: Personal knowledge?

[129] The Witness: I don't have personal knowledge. I haven't seen with my eyes.

Judge Bell: You can't tell what you heard. Mr. Moore, that would be very simple if you can show that somebody is living in Taliaferro County and sending children into adjoining counties. They will soon have some friends over there going to school in that county. That is what we have already ruled on one time. Everybody is under a court order and we will open up the doors if you can prove that, but just don't go out on a side issue.

Q. Mr. Turner, did the Taliaferro County Voters League make a survey of the Negro registered voters in the county?

A. It did.

Q. When did it make that survey? A. They made that survey prior to the last general election.

Q. And when was the last general election? A. The last general election was in 1967.

Q. And what did you do in making a survey? A. We got volunteers. There were people who volunteered to go from house to house and to survey every Negro home in Taliaferro County.

Judge Bell: What relevancy is that?

Mr. Moore: To try to establish the actual number of Negro voters in the county, Your Honor.

Judge Bell: Well, nobody is disputing it. But you have [130] got to prove it. We didn't stipulate that, did we?

Mr. Owens: No, sir, we didn't, Your Honor.

Judge Bell: Well, wouldn't Secretary Fortson's office show these figures.

Mr. Moore: They show the figures but I didn't know whether or not the defendants accepted the figures, so I wanted to prove it.

Judge Bell: Well, the Court can take judicial knowledge—well, I see, we don't know which is Negro and which is White.

Q. You did make a survey by going from house to house?
A. We did.

Q. Did you record or write down the results of the survey? A. We did.

Q. Do you have any record or records that you kept as a result of this survey? A. We do.

Q. Did you bring those records into court with you? A. We did.

Q. Are those records contained in the file box that I have here? A. They are.

Q. Will you tell the court what is in the boxes? A. There is a card of every Negro registered voter [131] in Taliaferro County that is eligible to vote. Those cards are filed in alphabetical order. There are 949 Negroes in Taliaferro County eligible to vote.

Judge Bell: 949?

The Witness: 949. And if it pleases the Court—

Judge Bell: —Wait a minute. How many voted in the last election, just out of curiosity?

The Witness: As far as I was able to determine there was about 100 Negroes who did not vote.

Judge Bell: All right.

Mr. Owens: Certainly the figures on voting are relevant, but we don't think the court should accept any figures made by a survey which this witness just has hearsay knowledge.

Judge Bell: I don't know why you want to object. It helps you. In the complaint there were eleven hundred and some odd Negro voters registered, and now they have got it down to 949. It looks to me like you would be glad to have that help.

Mr. Owens: We are just objecting to the method counsel is using to prove his whole case.

Judge Morgan: Let me ask this; Did you compare that with the voters registered? You had a voters list, didn't you?

The Witness: We had a voters' list.

Judge Morgan: You ran that against the voters' list, checked that against the voters list?

The Witness: We did the best we could, but that was [132] not an adequate way to come up with an adequate figure.

Judge Bell: Because a lot of those folks had left the county?

The Witness: Well, I see some people on the voting list in my family who have been dead and buried for ten years.

Judge Bell: All right.

Judge Morgan: The list hadn't been purged in that length of time?

The Witness: It hadn't been purged.

Judge Scarlett: Although, that might have helped our good friend over here, I think that is purely hearsay, as some of them are dead and moved from place to place and then what information he had was not what he knew himself. It was some survey that was made, which is usually done in political campaigns. The question is how many voters have you got. They try to find that out in every political campaign.

Mr. Moore: Your Honor, we don't want to introduce all of these records.

Judge Bell: We don't want any card system in here.

Mr. Moore: But the records could come in as the business records of the unincorporated association.

Mr. Owens: We don't agree to that, Your Honor. These are business records.

Judge Bell: Well, I tell you what we will do, we will take this evidence in for whatever weight the court wants to give it. I don't know whether it is hearsay or not. My own idea would [133] be that it would be like an accountant testifying. He has handed you the record and if you want to look at them we will take a recess, but Judge Scarlett has got one view and I have got one and Judge Morgan has got one and we won't break the case down over this.

Mr. Owens: We don't either, Your Honor.

Judge Bell: All right.

Q. Mr. Turner, can you reconcile the difference between the number of registered voters, Negro registered voters that you testified to in court and the number alleged in the complaint?

Mr. Owens: May it please the Court, we object to that, that is a conclusion.

Judge Bell: He has already said what the difference is, Mr. Moore. He said that members of his own family had been dead and yet were still on the voters list. The court can draw an inference as to what the difference is. We won't get into that.

Q. Do you have any knowledge of any white persons who are not qualified by death and non-residency whose names appear on the voters list? A. We know and we do have a list. We were here in '65, I believe, and the children, the white children that left the county, their parents moved and established residence in other counties and we found—

[134] Judge Bell: —They are still voting in your county?

The Witness: They are still voting in the county.

Judge Bell: All right.

The Witness: And which they are still on the voters' list as residents in other counties.

Judge Bell: All right, that's enough.

Q. Are some of them on the Jury list, the Traverse and Grand Jury list?

Judge Bell: What difference does that make? They can't serve. If they don't live in the county they can't come back over there and be on the jury.

Mr. Moore: I know, Your Honor, but they—

Judge Scarlett: —They sure can't serve if they are dead.

Judge Bell: Well, if they have moved out of the county—I imagine there is a plenty of people in every county on the Jury list that don't live in the county any more. In this country where we have freedom of movement you don't have to go check in with some official to get permission to move.

Mr. Moore: No, sir.

Judge Bell: If you don't have to do that the officials don't know you have moved.

Mr. Moore: But you have to stop exercising the privilege when you are disqualified.

Judge Bell: Well, do you have any evidence of anybody [135] living in another county serving on the Grand Jury in this county?

Mr. Moore: Lets see if we can get these names from Miss Williams.

Judge Bell: All right. Mr. Moore, it wouldn't prove anything if you found a man's name on the list who lives in another county, you would have to show that somebody had served on the grand jury, or served on the traverse jury who is no longer living in the county. It is conceivable that you would have some boy working in Atlanta, we will say, some young fellow that considers himself to be a resident of Taliaferro County and he would come back down there and sit on the jury. I, myself, operated like that when I was a young man down at Americus, Sumter County.

Mr. Moore: You were advised of your rights.

Judge Bell: Well, I had a right. I was a citizen of Sumter County.

Mr. Moore: I meant your rights under the Fifth Amendment.

The Witness: I have found one that I would like to mention for the Court's consideration—

Mr. Owens: —I would like to inquire if this is in response to the question that was propounded by counsel?

Judge Bell: This is in response to the question, as to whether or not some fellow had moved out of the county and sending his children to another school in another county and still over there serving on the jury.

[136] Judge Morgan: Grand Jury.

Judge Bell: On the Grand Jury. Go ahead.

The Witness: Mr. Rastus Durham, who mentioned that his children are in Greene County now, and Mr. Arthur Brown, whose children has telephone residence in Wilkes County, this is where his children is going, and I see their names. Those are two that I immediately pick up.

Judge Bell: Have they served on the Grand Jury?

The Witness: I could not answer as to that.

Judge Bell: You see, that is not relevant unless they have served since they moved out of the county. All right. Mr. Moore, I believe you are about to run out.

Mr. Moore: Well, that concludes our examination of the witness.

Judge Bell: Now, have you got any other evidence that you want to offer? I am trying sorta set up a schedule.

Mr. Moore: Well, I have two things, Your Honor. One is I have an affidavit here and—

Judge Bell: —Wait a minute. I don't want you to offer anything. I am just trying to get a summary, just trying to size up the situation at this point. Now, you say you have got an affidavit that you want to offer?

Mr. Moore: Yes, sir.

The Court: What else?

Mr. Moore: I want to put on the Voters Registration List, the last one preceding the election and I think that will [137] close our testimony.

Judge Bell: What does that prove?

Mr. Moore: Well, you see, the Grand Jury is selected from the voters list.

Judge Bell: I see. You want to show how many people were on the list at the time the Jury Commissioners selected these names?

Mr. Moore: Yes, sir.

Judge Basis: All right, what else?

Mr. Moore: And we want to show the demography characteristics of the community.

Judge Bell: On what basis?

Mr. Moore: Well, it is information for the court in examining the petition.

Judge Bell: Well, that is a broad term.

Mr. Moore: For example, we want to show the number of people in the county, black and white by all ages, the percentage of white and percentage of black, and we want to show the number above 21.

Judge Bell: Did you take that from the Census Bureau?

Mr. Moore: Yes, sir.

Judge Bell: All right.

Mr. Moore: And we have that information reduced in an affidavit.

Judge Bell: During the luncheon recess, Mr. Moore, [138] show these affidavits and exhibits to opposing counsel and it may be you all can stipulate them. If it is Census data I know you can.

Mr. Moore: There is one other short witness that we would like to put on who will testify as to complaints, the inability to make effective complaints to the school board.

Judge Bell: All right, sir, you can put that witness on, and that will be the only other live witness that you have.

Mr. Moore: Well, we may want to put on a couple of Commissioners, but we really don't think it is necessary, Your Honor.

Judge Bell: You want to go by statistics, but the court wants to know more than that. If the luck of the draw produced this list as it is that would make a much stronger case sustaining the list than if the Commissioners used some discretion about who was going to be on the grand jury, you see. That is the only fact that the court needs to know about, and—

Mr. Moore: —Well, they almost answered that in their answer to the interrogatories, Your Honor.

Judge Bell: What does it say?

Mr. Moore: Your Honor, we ask them to answer No. 10 of the interrogatories to defendants, Jury Commissioners, we asked them this question: "Describe in full and complete detail procedures which you followed in selecting persons for the Grand Jury list of Taliaferro County, Georgia."

Judge Bell: What does it say?

[139] Mr. Moore: And they say in their answer to number 10: "From the official registered voters list which was used in the past preceding general election. As a group we selected a fairly representative cross-section of the upright and intelligent citizens of the county. There was no set procedure for this selection process. We did it as a group."

We asked in number 11: "State how you determined whether a person is upright and intelligent". And the answer to No. 11 was "Our determination was based upon knowledge already possessed by

Jury Commissioner, or Commissioners upon investigation."—

Judge Bell: In other words, you take that to mean that they selected the ones they wanted to serve on the Grand Jury list?

Mr. Moore: Your Honor, I take this to be what they do in selecting. This describes the selection process.

Judge Bell: I don't know. Suppose they put everyone on the list in some method and they had 300 whites and 100 Negroes, well, then you have the first question "Is that fair list"? But when they draw names out, or in some way they get names to go on a separate Grand Jury list they get down to where they don't have but eleven Negroes on the Grand Jury out of 130 people, I want to know, did they draw names out of a hat or did they pick out people they wanted to serve on the Grand Jury? I don't know whether that answers that or not, but I think we had better find that out because the way it stands now, with only eleven Negroes on the Grand Jury out of 130 and the county divided on the basis [140] of race it seems to me there would never be a Negro on the Board of Education between now and the end of time.

Judge Morgan: Isn't this getting down to fundamental of the case right here? Isn't this the whole crux of your case right here?

Mr. Moore: Because the Grand Jury elects the Members of the Board of Education.

Judge Morgan: Yes.

Mr. Moore: And the electing process is such that the Negroes are fenced out.

Judge Bell: Well, they don't have an election. They have a selection process, not an electing process.

Mr. Moore: The Grand Jury elects the Members of the Board of Education.

Judge Bell: Well, I know, but they select.

Mr. Moore: They elect.

Judge Bell: All right, you call it an election.

Mr. Moore: Your Honor, that is what they call it and that's what the law calls it.

Judge Bell: All right.

Judge Scarlett: Wouldn't you say they elect and select, do both?

Judge Bell: Both.

Mr. Moore: All right, and Your Honor I can put it another way and say they are discriminating in their election.

Judge Bell: If they are elected, it is a mighty small [141] electorate to say the least, and you are being excluded from the electorate with the Grand Jury. All right, well, we will stop here until after lunch and there will be the cross examination of Mr. Turner and then you can finish your case up, and in the meantime show opposing counsel your affidavits, and shorten up the other witness about the complaint because you don't want to put up too much along that line, I don't thing. And then at that time we will have to have some stipulation or some live testimony about how they select this Grand Jury and then at that point we will decide what we are going to do next.

We will recess for an hour and come back at 2:00 o'clock. Wait a minute, the Court doesn't know the

town very well. Is an hour long enough to get lunch?

Mr. Owens: About an hour and a half, Your Honor.

Judge Bell: That's too long. We never have had an hour and a half recess. But we will recess for an hour and fifteen minutes, 2:15.

The Marshal: Take a recess until 2:15.

(NOTE: Accordingly a recess was then had from 1:00 o'clock, P.M., until 2:15, P.M., of the same day at which time the proceedings were resumed as follows.)

Judge Bell: You may proceed.

Mr. Owens: All right, sir.

[142] *Cross Examination by Mr. Owens:*

Q. Now, Mr. Turner, on the list of Traverse Jurors, as previously examined by you, it is correct that included on that list is your wife, is that right? A. Right.

Q. She is on the list? A. She's on the list.

Q. And it is also true that your father is on that list, isn't he? A. That is exactly right.

Q. Any other member of your family on that list? A. No.

Judge Bell: Is that the Traverse list?

Mr. Owens: That's the Traverse list, Your Honor.

Judge Bell: Are you on the list?

A. I am not.

Q. Now, would you tell the court specifically what complaints, if any, you yourself have brought to the attention

of the Board of Education of Taliaferro County? A. At this point, I am sorry, I haven't brought any because of the fact—

Q. No, I didn't ask why. What complaints have you brought?

[143] Mr. Moore: I think, Your Honor, the witness is entitled to explain his answer.

Judge Bell: Well, he hasn't answered yet is the trouble about that. He can explain his answer but he first must answer. Now, the question would be yes, or no, or one or two, or whatever it is.

The Witness: No, none.

Judge Bell: Now, you can explain.

Q. Now, would you like to explain why? A. The reason why is that I and no other member of the colored community have had the opportunity.

Q. What do you mean by opportunity? A. The opportunity of not knowing when, where and the hour of the Board's meeting.

Q. During this procedure, did you consult you a lawyer about when the State Law—

Mr. Moore: That's an improper question, Your Honor, whether he consulted a lawyer or not.

Judge Bell: Well, we don't know what he is going to say. Let him finish his question. I don't know what he is going to say. Go ahead with the question and then we will rule on it.

Q. Did you consult you a lawyer about when the State Law of Georgia says that the Board of Education shall meet?

Mr. Moore: That question is improper, Your Honor.

[144] The Witness: Judge—

The Court: —Wait just a minute. What's improper about it?

Mr. Moore: It is improper to ask about any matter that this witness took up with a lawyer. That's privileged fact.

Judge Bell: I don't know of the fact of communicating with a lawyer is privileged. I have never heard that before. If you go into what he conferred with him about is privileged.

Mr. Moore: He is asking him what he said, Your Honor.

Judge Bell: He asked him did he consult him.

Mr. Moore: About the hours of the Board meeting.

Judge Bell: Well, suppose he says "No?"

Mr. Moore: Well, I think that is a privileged matter.

Judge Bell: I don't think so. Did you consult him or not?

The Witness: Judge—

Judge Bell: Just answer yes or no to whether or not you consulted him. You can't go into what was said.

The Witness: Yes.

Judge Bell: All right.

Q. From your lawyer or from anyone else did you determine the State Laws of Georgia specifies that the Board of Education shall meet?

Judge Bell: You see, that doesn't mean a thing in the world. If the people haven't been following the

State Laws, what [145] good does it do to ask him if he knows the Georgia Code? They have got something in the record somewhere here that they don't meet when they are supposed to meet.

Mr. Owens: May it please the Court, the record shows that they meet on the first Tuesday in every month.

Judge Bell: But he has testified that they don't meet then. He testified on direct that they do not meet when they are supposed to, and that he couldn't find out when they were going to meet.

Mr. Owens: Yes, sir, he said that he couldn't find out, and I am trying now to find out why he couldn't find out.

Judge Bell: Well, maybe he is going to take it that they don't meet at the right time, or something. I don't know. Go ahead.

Q. Have you been to the courthouse on the first Tuesday in every month? A. The time this Committee met with the board was the following month.

Q. I am asking you if you have done that? A. I was with the committee on the second attempt.

Q. And when was that? A. That was the following month after the committee met.

Q. The following month, what is the month you are speaking of?

[146] Judge Bell: October 1966.

Q. The first Tuesday in October 1966? A. We are speaking of November which was the following. It was October.

Q. October of 1966? A. If my memory serves me cor-

rectly it was October of 1966 when the Committee met with the Board of Education.

Q. And you were there? A. I was not there.

Q. Well, when did you go? A. The following month, which was November, at the same night and hour.

Q. The same night and hour? A. The following month, one month later.

Q. What day of the month was it on that you went before the Board? A. That was the first Tuesday night, if my memory serves me correctly.

Q. Were the Members of the Board of Education there? A. They were not there, or at least we did not see them, and nobody was in the Superintendent's office, if they were, they did not answer the knock on the door.

Judge Bell: What does the law say about meetings of the County School Board?

[147] Mr. Owens: It specifies, I believe, Your Honor, if I remember correctly, that they will meet on the first Tuesday, that's the time specified, and that Notice will be published in the paper once a year as to when they meet and that has been published.

Judge Bell: Now, do you have the Minutes of the School Board here so we can see if they met?

Mr. Owens: We did not bring them.

Judge Bell: Well, suppose you produce them and we can settle this, if they have been meeting when they are supposed to meet. Make a note of that, Mr. Evans, some of you over there, so we can get the Minutes and this can be very easily resolved by looking at the Minutes. Bring the Minutes from the September meeting in 1966 up to date.

Mr. Owens: Excuse me just one minute, Your Honor.

Judge Bell: All right.

Q. At anytime did you go on the first Tuesday in each month at 10:00 o'clock, A. M., to the office of the Superintendent there in Taliaferro County— A. —state the first part of that question again.

Q. At anytime did you go at 10:00 o'clock, A. M., on the first Tuesday in the month for the purpose of trying to attend a meeting of the Board of Education of Taliaferro County at the office of the County School Superintendent— A. —I did not.

[148] Q. You did not? A. No, sir.

Judge Scarlett: Didn't he say in his direct examination that he went at night and knocked on the door?

Mr. Owens: He did, Your Honor.

Judge Scarlett: And then didn't you testify just now, when you read the Minutes there, they said they held the meetings in the morning, didn't they.

Q. The only time that you are testifying about that you tried to go was in the evening hours at night on the First Tuesday in the month, is that correct? A. That's correct.

Judge Bell: In addition to producing the Minutes, Mr. Owens, produce the Notice from the newspaper that the law requires Notice, so we can compare the Minutes with the Notices and see if they have been meeting when they are supposed to, and that will be a lot better evidence than having somebody trying to remember.

Mr. Owens: Are your Honor asking that we produce those today?

Judge Bell: No, sir, you can send them in at your convenience.

Mr. Owens: Thank you.

Q. Now, you made reference to the fact that you could never get into the Superintendent's office on your direct examination. Now, would you tell us in detail when you were unable [149] to get into the Superintendent's office and who, if anyone, stopped you from going into that office?

A. If my memory serves me correctly the Judge knows that I was speaking in terms of prior to the time when we were here and—

Judge Bell: —Prior to the last trial?

The Witness: And he said not to speak from before then.

Q. Lets take since then, since October 1966.

Judge Bell: He didn't testify to that, Mr. Owens.

The Witness: I didn't say that I couldn't get into the Superintendent's office since October of 1966.

Judge Bell: He was trying to testify about prior to the last trial and I told him not to do that.

Mr. Moore: I think we can clarify his testimony, if the Court will excuse me for interrupting; if we take notice of answer to interrogatory No. 38 from the School Board in which they said "We have met at the regular meeting time every month since September 1, 1967," leaving the inference that—

Judge Bell: Well, we will look at these records. We will resolve all of that. Go ahead.

Mr. Owens: All right, sir.

Judge Bell: When you furnish that information, Mr. Owens, cite us the Georgia Law.

Mr. Owens: We will, Your Honor.

[150] Q. Now, what complaints, if any, do you have with the Board of Education other than the fact you think the parents are being treated coldly? A. I think I stated that the main complaint were lines of communication and this has completely been cut off and there were other things which would have grown out of in solving the grievances that Negro parents had if there had been lines of communication.

Q. What grievances? A. Grievances?

Q. Yes? A. As I said, the main one are the lines of communication.

Q. What lines of communication are you speaking of? A. Between the representatives of the parents of Taliaferro County and the School Board of Taliaferro County.

Q. Well, when was there no communication? A. There was none certainly in October of 1966, and not since then. There has not been any line of communication since we were here at the hearing last on the Taliaferro County school system.

Q. You mean by line of communication that the Board hadn't come and invited you into the meetings? A. No, sir.

Q. Well, what do you mean by that? [151] A. We mean that we have made attempts to go to the Board and we found that their doors were not open.

Q. The occasion you are speaking of is in the evening on the Tuesday night you told us about already? A. Right.

And we have sent letters after we were supposed to have gotten a hearing or some type of reply back after October, we never got it, and we wrote to the Chairman of the Board, as I said, somewhere in February or March, and we had made other attempts to go back that same night a month later and at the same hour and we found nobody there, so the next step was to write the Chairman of the date and the hour of their meeting.

Q. Did you ask Mrs. Williams, Superintendent of the Schools? A. No, we did not ask Mrs. Williams. I have no knowledge of asking Mrs. Williams.

Q. The only thing you have done was to write the letters? A. And also to call the Chairman of the Board of Education.

Q. Who is he? A. Mr. Horace Williams.

Q. And what did you ask him again? A. We asked him—

Q. —What did you ask him? Not we. What did you ask him? [152] A. I asked him when did the Board of Education meet, at what time, and he said that it had met and "I have nothing else to say."

Q. You didn't ask him when was the next meeting? A. I didn't have a chance to ask him.

Q. Now, in paragraph 11 of your complaint you state: "Defendants have chosen and threaten to continue to choose an all-white school board to superintend the all-black public schools of Taliaferro County, Georgia," and then you go into certain state laws. Now, would you tell the Court factually what it is that justifies your making that statement in your complaint? A. Will you state the question again, please?

Q. Your complaint states that the defendants or all the people named in this complaint, Members of the Board of

Education, Grand Jurors, Traverse Jurors, everybody you name in here, have chosen and threaten to continue to choose an all-white school board to superintend the all-black public schools of Taliaferro County, Georgia. Now, factually, what are you referring to when you make that statement? A. What I am referring to—

Mr. Moore: —Just a minute, Mr. Turner. Your Honor, it is already stipulated that the school board is all-white, and the evidence is before the court that they threaten to choose additional white members—

Judge Bell: No, that they did, not that they threaten. [153] Did they do it, not that they threaten to do it.

Mr. Moore: They threaten because the Board of Education itself has elected two members to fill a vacancies—

Judge Bell: Yes, but—

Mr. Moore: —And according to the stipulation, the election of the Board of Education has to be confirmed by the Grand Jury.

Judge Bell: We know all of that, but the question is; is there anything that Mr. Turner had in mind when he alleged this in his complaint. Now, he has got a right to ask that.

Mr. Moore: I don't see how that makes a difference. That's a conclusion.

Judge Bell: Well, that's up to the court. That's for the court to decide. Objection overruled, go ahead and answer that Mr. Turner. Do you know of anything specifically?

The Witness: I certainly do.

Judge Bell: What?

The Witness: The fact that there have been vacancies since there has been an all-black school in Taliaferro County and there has been no attempt to put Negroes on that board.

Q. What individual defendant, or defendants, have threaten to continued in the future to see that all white people serve on the Board of Education? A. If it please the Court, I will just have to repeat it—

Judge Bell: Well, we understand that. But do you know [154] of any person, any individual, who has said that they are not going to put any Negroes on the school board?

The Witness: I don't know of any certain one.

Judge Bell: All right, that is what he is trying to find out. Finally what they mean by that in their complaint is that the facts show that they have had vacancies and never have put a Negro on the school board. All right.

Q. Do you yourself know of any Negroes who have appeared before a recent Grand Jury and urged the election of a Negro citizen—

Mr. Moore: —Objection. I object to that as being irrelevant and immaterial.

Judge Bell: How is that?

Mr. Moore: It doesn't make any difference whether they appeared or not.

Judge Bell: Well, he is exploring to see what efforts they have made. We know that they don't have to go before the Grand Jury, but he is just trying

to find out if they have been. I don't know how you would appear. You would have to first get permission to appear before the Grand Jury. Just answer the question, do you know or do you not?

The Witness: I do not.

Judge Bell: All right.

Mr. Owens: Give me just a minute, Your Honor.

Judge Bell: All right.

Mr. Owens: We have no further questions. Yes, one [155] further question, if I may.

Judge Bell: All right.

Q. In paragraph 18 of your complaint you have alleged that as a result of the conduct of all of these defendants that you and all the members of your class are unable to enjoy the full and equal benefit of public education in Taliaferro County, Georgia, free of discrimination or segregation because of their race or color. Now, what do you mean by that allegation in your complaint? A. I think, in plain words, we feel that an all-white board cannot plan an all-black school system. I don't think it is hard to see this. This white board has problems that are not similar to the Negro community and for that reason they are not acquainted with the technique and the approach to really solve the Negro problems as far as education is concerned.

Q. Now, is this Negro educational or social problem?

Mr. Moore: I object to that, Your Honor, that has nothing to do with it, whether it is social or educational.

Judge Bell: Well, it has a great deal to do with it. The court construes that paragraph of the petition to mean, based on the evidence, that the First

Amendment has been suspended in Taliaferro County to the extent that citizens can't assemble before their officials and petition for their grievances. That's been the evidence. That's number 1. Number 2 he says is because there is no Negro representation on the school board, that the school board is all white, that they can't give any counsel or [156] advice to their problems that are peculiar to a Negro school, and then you want to know if it is social or economic.

Mr. Owens: Social or educational problems.

Judge Bell: Well, I don't know how you would separate social or educational problems. It seems to me that schools are great instruments of social problems or social endeavors. Are you talking about a picnic or are you talking about a way to live, learning and being educated?

Mr. Owens: May it please the Court, I want to know whether this witness' grievance is as to the amount of learning that the Negro children are now getting, or to what the condition is.

Judge Bell: Well, his first complaint, he has already gone into some detail that he can't assemble, that he can't petition for his grievances, that the school board won't let him come before them. That's number one. Number two now, he said that the white school board doesn't understand the problems of the Negro community enough to run the schools as they should be run, and that if they had some Negroes on the school board they could have better Negro schools. Now, you are saying, is that social? Can you answer that, Mr. Turner? I don't know just what he means by "social".

The Witness: To the best of my ability, Judge, I think it would be both, social and educational.

Judge Bell: Now, where do you separate social and education?

[157] Mr. Owens: May it please the Court—

Judge Bell: —What do you mean by social? Let me ask you a question. Are you talking about social in a sense that you go to a party together, or are you talking about social from a standpoint of sociology, where you need to get an education to make a living and those sort of things, to be a better citizen?

Mr. Owens: Well, may it please the Court, I may have one idea of social and the witness may have another.

Judge Bell: Well, that was what I was trying to point out.

Mr. Owens: When the witness comes here and makes a broad allegation about grievances—

Judge Bell: —Well, did he say anything about social?

Mr. Owens: —And that they can't handle these problems. I am trying to find out what he is speaking of.

Judge Bell: Did he say anything about social?

Mr. Owens: He hasn't yet, Your Honor.

Q. What complaint, other than the so-called lack of communication? A. I think I have stated some three or four times that the communication was the main, number one, and that if there had been communication we could have had an opportunity to discuss together, and is my thinking that in communication maybe that two could have discovered problems that neither one could have, but there were certain problems that we had found that the Board,

[158] I don't think, really was aware of and that this communication could have been very helpful, this line of communication.

Q. Now, I believe you stated that you are a freeholder?
A. Yes.

Q. How much real estate do you own in the county? A.
In terms of acreage or in terms of value?

Q. I want you to tell us both, the quantity of land and the value?

Judge Bell: Well, I don't know that you need to know that. I suppose he can answer it; but he said he was a freeholder.

Mr. Owens: Yes, sir, we just want to know what he means by that.

Judge Bell: I know, but now you want to go into his financial statement.

Mr. Owens: No, sir. He asked how I wanted it. Either way suits me. We don't insist upon any type of description, whether he owns a house or a lot.

Judge Bell: The Court is not going to let you go into his financial statement.

Mr. Owens: We don't desire to do that, Your Honor.

Judge Bell: All right.

Q. You own a house and lot? A. I do.

Q. Is that what it is? A. That's what it is.

[159] Judge Bell: How much land does your father own?

The Witness: My father owns around about a 150 acres.

Judge Bell: How much does your grandfather own?

The Witness: It's the same land that my grandfather owns.

Judge Bell: They own it together?

The Witness: My grandfather has willed it to my father.

Judge Bell: Is he living now?

The Witness: He has given it to us.

Judge Scarlett: Well, if he didn't make a will, he made a deed then, is that it?

The Witness: I am sorry, Judge.

Mr. Moore: I don't know whether that is important or not.

Judge Bell: Well, don't you get off into this land business now.

Mr. Moore: I want to know, in view of that, if it is a will, or—

Judge Bell: Well, we are out of the land business. All right, now, Mr. Evans, do you have any questions?

Mr. Evans: I might ask one.

Judge Bell: All right.

Cross Examination by Mr. Evans:

[160] Q. Mr. Turner, when you were talking about communications, I would like to ask you: Did you ever pick up the telephone and call Mrs. Williams, the Superintendent, and find out when the meeting was? A. I have tried to call Mrs. Williams and the 'phone didn't answer many times in the office. I thought one time that I had found her, and I called the private school and the person who was attending

the 'phone said "Hold on just a minute, and I will get her for you." And when she came back she said "I am sorry she is not here." This was the only time really that I thought we were getting close to talking to her on the telephone.

Q. Did you ever write a registered letter to Mrs. Williams? A. No, sir, we did not.

Q. Did you ever send a telegram to Mrs. Williams? A. I don't remember.

Judge Bell: Can you send a telegram in Crawfordville?

The Witness: You can send a telegram.

Judge Bell: I don't know, I am trying to find out if they have got a telegraph office there.

The Witness: You can send one.

Judge Bell: All right.

Mr. Evans: I will ask the Court to take judicial notice that the School Superintendent is the ex officio Secretary of the County Board of Education.

[161] Judge Bell: Well, let me ask Mr. Turner: Did Mrs. Williams, the County School Superintendent have an office?

The Witness: She does.

Judge Bell: Where is it?

The Witness: In the court house.

Judge Bell: Does it have a telephone in it?

The Witness: It has. It ringed.

Judge Bell: Is there a secretary in there?

The Witness: I don't think she has a secretary.

Judge Bell: Is there anybody else in the office—do somebody else occupy the office besides Mrs. Williams?

The Witness: Not that I know of.

Judge Bell: Not that I know of. All right, anything else before we excuse Mr. Turner?

Mr. Moore: One or two questions, Your Honor.

Redirect Examination by Mr. Moore:

Q. Mr. Turner, do you have any specific complaint about the quality of teaching in Taliaferro County at the present time?

Judge Bell: This is getting far afield now.

The Witness: The only way that I could evaluate the [162] quality of teaching that is given at the school is what I see in my children when they come home, and working with them I can't say that I have had the freedom to visit or to go and to feel free in the school system of Taliaferro today to get even get a bird eye view of what type of educational program they are providing for the children inside of the walls. Now, from what my children are bringing home in terms of achievement, I would say no.

Mr. Moore: No further questions. You can come down.

Judge Bell: All right, you can be excused, unless you have another question, Mr. Owens.

Mr. Owens: I would like to ask one further question, Your Honor.

Judge Bell: All right.

Recross Examination by Mr. Owens:

Q. In your complaint you also state that the policy, custom, practice, and usage of the defendant school board has been such as to deprive the plaintiffs and members of their class of textbooks, facilities, laboratories, recreation facilities, teaching programs, bus transportation, and a multiplicity of other advantages which should rightfully be theirs, etc. Now, what do you mean when you put that in your complaint? [163] A. I think I have partly answered that question when I say that really to look at the situation, well, the only way to look at it is generally from the outside, and I said that a bird eye view is when you go inside. My children are the ones and the only real way that I can determine, and I think that this is the method which I have used.

Judge Bell: This has gone on far enough now, Mr. Owens. There has been a complete failure of proof on most of those things you ask for. Now, why do you want to go into that?

Mr. Owens: I just want to make sure, if I haven't referred to that, Your Honor.

Judge Bell: Well, it is already stipulated that they have got a school bus system. That's wrong. You see, on most of those things there has been a failure of proof. This case really gets down to one question, and that is the question of whether they are going to have any Negroes on the school board in a county where they have nothing but Negro schools. That's what it gets down to. Now, we have got the Jury System under attack, we have

got all sort of things going on, side issues, but this is really all that it amounts to, and the question the Court is going to have to decide is what to do about that. Now, if we are going to try to run the Grand Jury, then we are going to have to go into the jury system, but if there was some way that you could get somebody on the school board from the Negro [164] community, and then you might not have to go into all these other things. You can go down, Mr. Turner.

Do you have another witness that you want to put on something about complaints? In other words, is it the same kind of evidence?

Mr. Moore: It is essentially the same evidence, but I think it is a little better though.

Judge Bell: Well, put it on then. I don't to tell you how to run your case.

Mr. Moore: Mrs. Allen, will you come around to the witness stand?

Judge Bell: I think the idea, if there is any proof of it, I mean if there is no rebuttal to it, that the citizens can't even get to meet with the school board, which would be pretty bad, but of course the defendants say that they have been meeting at the regular time and nobody comes to the board. Let her come up on here, and swear her in, Mr. Clerk.

[165] MRS. MARY ALLEN, sworn for the plaintiffs, testified.

On Direct Examination By Mr. Moore:

Q. Mrs. Allen, will you speak up so we all can hear you?

Judge Bell: Now, what did you say your name is?

The Witness: Mary Allen.

Judge Bell: Mary Allen?

The Witness: Yes, sir.

Judge Bell: Now, are you "Mrs.," or "Miss"?

The Witness: Mrs.

Judge Bell: All right.

Q. Now, Mrs. Allen, in the school year 1966 and 1967, did you have a child enrolled in the Taliaferro County School System? A. I did.

Q. What was your child's name? A. Sandra Allen.

Q. Did you have any other children? A. No.

Q. And what grade was she in? A. I beg your pardon. I have a young girl that lives with me since she was 12. She was in the high school at that time. She was there, but she is not my child, she just lived with me.

[166] Q. All right, and how old is Sandra and what grade is your child in? A. Fourth grade.

Q. And did you have occasion during the school year 1966-1967 to go to the school? A. I did.

Q. And what was your purpose in going there? A. Well, the first time I went up there, I got a call from the teacher. The teacher said that my daughter was sick and that I should come and pick her up and so I went over and picked her up and so she told me "I had been intending to talk to you. Your little girl is failing." She said: "She has

to be placed back to group number three from group one," and I said: "Well, if you have to place her back, why didn't you tell me, and if I had known there is perhaps something that I could have done to help." I said: "What can I do?" Before then she had been an "A" student. Then to place her back in group three without my knowledge disturbs me. I said: "In what class does she fail?" She said: "Math." So, I got a fellow, a young fellow, from the high school—there is a young girl that lives with me, she attends the high school, and she told me that this excellent student in the high school would come in and help her, and so I asked him if he would, and he said: "Yes, I will come in and help her." I said: "I will pay you." So he came in and helped her, so after about a month I thought she had improved and then [167] I wanted to go back but before I did I called the school and asked if parents could visit the school and I was told yes by the principal, that parents can come to the school. I said: "Well, can I come over and talk to the teacher about my daughter?" He said "Yes." I didn't go that day, but I went another day, another morning with her. I called him on a Thursday or Friday, but on a Monday I went with her. So I went to his office. He said: "You will have to come by the office and get my permission." I went to his office and I asked if I could have permission to go in and talk with her teacher. My purpose in going in the first place was to find out if she had improved any. So he said to me: "Yes, you can go in. Just go on in." And I did, I went to the door and I asked the teacher, Miss Hadden, if I could come in. She said: "Yes, you can come in." She said: "Did you go by the principal's office?" I said: "Yes, I did." She said: "Well, come in and have a seat." I said: "I don't want to stay long because I had an appointment and I could only stay

about fifteen or twenty minutes, but I did want to sit in for just a little while in her class to see if she was improving", and there was one other thing I wanted to see too, and I want to tell you about it; but I took a seat. She gave me a chair and I set there, and I was there about five minutes and the Superintendent started in the door. I saw her. She started in the door and then she turned, but I can't say where she went, I don't know. I didn't try to find out, but I did see her start in the door, and then she turned [168] and she came a few minutes after that and pushed the door open and said: "Miss Hadden, discontinue this class until the parents leave." Well, it was a shock to me. I had gone through the regular procedure, and—

Judge Bell: Wait a minute. You don't have to tell how they insulted you. The Court can draw its own conclusion about that. Did they put you out?

The Witness: He didn't push me out. He told her to discontinue her class until I left. I didn't want to interfere with the class.

Judge Bell: What happened then? Did you leave?

The Witness: I left. I told them "No, don't do that because I didn't come to interfere. The main thing I came for was to find if my child was improving. She said: "Well, there has been some improvement and we put her back in group two.

Judge Bell: All right.

Judge Scarlett: Did you talk to your child any in class? Did you talk to your child any while she was in class?

The Witness: I didn't talk to anybody. I just took a seat.

Judge Scarlett: I know, but after you took a seat and you were in that class, then did you talk to the child?

The Witness: I didn't talk to anyone.

Judge Scarlett: All right.

The Witness: I just took a seat to look on, and my [169] main reason for wanting to look on, of course, I know I could have asked her and she could have told me; but the main reason I wanted to look on was because there was something else that disturbed me. I noticed—of course, I didn't notice before I found out that we had this little problem, but I did notice, for instance, like today she would come home and say "My lesson is on page 25", and then when she would go back to school the next day and come home she would say: "Mamma, we studied this. She didn't even hear the lesson on 25. She turned me over to 73 or 13 or something like that, we didn't even study that, so—

Judge Bell: All right, wait a minute. Lets don't go into that any more. You have established the fact that you had a problem with the child.

The Witness: A real problem.

Judge Bell: What the court is interested in is the fact that you were not allowed to stay there or to visit there to check up on your child. Now, is there anything else you can tell us about that?

The Witness: Well, the principal told her to discontinue the class, so—

Judge Bell: —All you know is that you were invited in there with permission?

The Witness: That's right.

Judge Bell: You were sitting in there and you saw Mrs. Williams, the Superintendent—

[170] The Witness: —I saw her come to the door, and push the door open, but she didn't come in. Really—

Judge Bell: —Now, wait a minute. The next thing you know, in a few minutes—how long was it?

The Witness: About three minutes, I reckon.

Judge Bell: About three minutes?

The Witness: About three minutes. I wasn't even expecting that.

Judge Bell: You said the principal came in. What was his name?

The Witness: The principal just pushed the door open and said "Miss Hadden"—

Judge Bell: —Wait a minute.

The Witness: Discontinue the class—

Judge Bell: —What was the principal's name?

The Witness: Mr. Teleton.

Judge Bell: How do you spell that?

The Witness: T e l e t o n, I believe. I am not sure.

Judge Bell: Mr. Teleton?

The Witness: I may be wrong.

Judge Bell: And the teacher's name was Miss Hadden, you say?

The Witness: Hackney, I think it is.

Judge Bell: Well, how do you spell it?

The Witness: H a c k n e y, I think it is.

[171] Judge Bell: All right, the principal said to discontinue the class until the parent leaves?

The Witness: Until the parent leaves.

Judge Bell: What else happened then?

The Witness: I got up. I didn't want her to do that because I didn't want to interfere.

Judge Bell: I know, but did you leave then?

The Witness: I left then. I told her that I was sorry, that I hope I had not made any real trouble for her. I wasn't looking for trouble. I didn't want any trouble. I just wanted to find out about my daughter.

Judge Bell: All right.

Q. Did you try to meet with the Board of Education?
A. I did. I went back to the principal's office and I asked him why did he do me that way, and he just refused to talk with me. Another teacher came to me and said "I know why that—

Judge Bell: —Wait a minute. You can't tell what somebody else told you.

Mr. Moore: Just a minute, Mrs. Allen.

Judge Bell: That's hearsay. Just strike that, anything that somebody else told her.

Q. Now, Mrs. Allen, after you went to the school and was put out and treated inhumane—

Judge Bell: Now, wait a minute, Mr. Moore. That's up [172] to the court to decide whether she was treated inhumane or not. Don't get us off the bench. Don't displace us altogether. Just ask the question. Don't make a speech now. We are not having any closing arguments now.

Mr. Moore: All right, sir.

Q. Mrs. Allen, did you make an attempt to present your grievances to the Board of Education? A. Well, the first thing I did was to try to see if we could have a PAT.

Judge Bell: Wait a minute. I want to ask you a question myself. You went to the principal and asked him why he did you like that?

The Witness: I did.

Judge Bell: And you say he wouldn't talk.

The Witness: He wouldn't talk.

Judge Bell: All right, now let's go to the school board.

Q. Did you try to meet with the Board of Education? A. After I had tried with the principal to see if we could have a PTA.

Q. When did you try with the principal to see if you could have a PTA? A. About a week or so after the meeting, after I went to the school.

Q. Were you permitted to have a PTA? A. He told me, he said: "We are not going to have a PTA." He said: "You can see the principal over at the high school [173] and see what he says. I don't know what he is going to do, but we are not going to have the PTA this school term", well, at that time I was acting—well, I was the last secretary the PTA had and I had all that PTA material, so I called the principal at the highschool and I asked him if there was going to be a PTA. I said: "I have other material and I need to know and I have some problems." I wanted to have some kind of communication with the teacher, one that I could talk to and maybe she could help me with my daughter. That was my main concern.

Judge Bell: All right, what did he say about the PTA?

The Witness: He told me, he said: "I don't know. Mrs. Williams hasn't said so yet." He said: "Do you want me to call her? Do you want me to ask her, or do you want to ask her?" I said: "No, I didn't want to ask her. I thought I was suppose to talk to the principal." He said: "Well, I will ask the Superintendent and I will let you know." I said: "Well, I will call you back. I called him back and he said the principal said we couldn't have any PTA.

Q. The principal or the Superintendent? A. The Superintendent said that we couldn't have no PTA.

Judge Bell: Now, wait a minute. The principal told you that?

The Witness: The principal told me that and that was when I decided to go with a committee and I went to get [174] on that committee then to see about the PTA. My only concern was my daughter.

Judge Bell: Wait a minute now. Don't go back onto that now. Now, you wanted to get the PTA?

The Witness: Yes, sir.

Judge Bell: Now, what we want to know is, did you go to see the school board?

The Witness: I went to the board. I was—

Judge Bell: —Just a minute. Now, what month was that? What year?

The Witness: Well, I don't remember the month, but it was the same time that PTA—that we met the Board. Well, I wasn't the secretary of that committee but—

Judge Bell: —I know, but have you got any idea what year it was?

The Witness: I really didn't keep that in mind, Your Honor, but it was the same time the committee met with the board.

Judge Bell: Was it the same time that your daughter was in the Fourth grade?

The Witness: Yes, sir.

Judge Bell: What grade was she in when she had this trouble?

The Witness: She was in the Fourth. She is in the Fifth now.

Judge Bell: Well, it was last year, the last school term, sometime?

[175] The Witness: Yes, sir, but I didn't keep any record of it.

Judge Bell: Well, did you go to the school board?

The Witness: I went with a committee, in fact, I took a committee down to meet the board because I wanted to talk about a PTA. That was what I wanted to know about then.

Judge Bell: All right, go ahead.

Q. Now, Mrs. Allen, you went to the school board? A. What?

Q. You went down to the school board? A. I went to the school board.

Q. Did you go in the daytime or the nighttime? A. We went at night because that is when the board meets now.

Q. Were you able to see the board? A. No, sir. We were asked to come in. We went in, and when we walked in the Superintendent said that only three can come in because we don't have seating space, and she said "What do you want? Have you got a grievance?" And a lady back in the rear said: "We have some grievances." I didn't say anything. She said: "We have some grievances that we want to discuss with the board." And she said "state it." Nobody else said a thing. Well, difference ones talked, different ones of the representatives said what they had to say. I didn't say anything right then, but when it came my time I said: "I want to know about [176] the PTA. I am here with a problem about my daughter and I want to know about a PTA." I said: "If I can't talk to the teachers I just need to know—"

Q. This was in the school board meeting, is that correct?
A. I beg your pardon?

Q. This was at the school board meeting? A. That's right. We asked them a few questions, and then one member got up and said I offer a motion that the meeting be adjourned—

Judge Bell: —Now, wait a minute. Was this in the courthouse?

The Witness: It was in the courthouse.

Judge Bell: And it was at night.

The Witness: It was at night.

Judge Bell: All right, how many people were in your group?

The Witness: Your Honor, I didn't count them. I know there were two cars but only a few were allowed in.

Judge Bell: I know, but did you have eight or ten in your group?

The Witness: Something like that.

Judge Bell: How many went into the office?

The Witness: Approximately five of us.

Judge Bell: Who else was in the office besides Mrs. Williams—the School Board Officials?

[177] The Witness: I assume all the school board members. I don't know.

Judge Bell: Were they sitting around?

The Witness: Yes, sir.

Judge Bell: How long did you stay in there?

The Witness: About ten minutes.

Judge Bell: And then they moved that the meeting be adjourned?

The Witness: That's right, and put the heater out. They had the heater on and a gentleman put the heater out and we walked out. He started putting the lights out too and we walked out and then they closed the door.

Judge Bell: Did they give you an answer at all as to your complaints?

The Witness: No answer.

Judge Bell: No answer?

The Witness: No, sir.

Judge Bell: Have you had one since then?

The Witness: No, sir.

Judge Bell: All right, go ahead, Mr. Moore.

Q. Is this the only time that you have been able to go to the school board? A. That was the only time I ever tried.

Q. Now, you have moved from Taliaferro County? A. I have moved from Taliaferro County.

[178] Q. When did you move from Taliaferro County? A. I moved in August.

Q. In 1967? A. In 1967.

Q. Where did you move to? A. I moved to Greensboro.

Q. And do you have a child enrolled in Greensboro? A. I have.

Q. Was your purpose in moving to Greensboro to get better education? A. To get communication. A child in school and you can't even talk with the teacher and can't go and sit in the classroom and can't talk to the board, can't talk to anybody, nothing about your problems.

Judge Bell: Have you ever talked to the teacher at Greensboro?

The Witness: I have been to the school. I go to the PTA once a month. I talk to the teacher. We can go in the classroom. Your Honor, you see, I don't want to make trouble.

Judge Bell: I know that, but—

The Witness: —May I tell you why I had a problem.

Judge Bell: Wait a minute. Now, we are not running a school system. I am sorry about your child but we can't go into all of that. We want to find out about your dealings as a citizen with the school and with the Board of Education. That [179] is really what we are interested in, how you were received and what happened and so forth with the School Board and the School Superintendent.

The Witness: Well, we were received.

Judge Bell: All right.

The Witness: But we got no answer.

Judge Bell: All right.

Q. Do you know any white children from Taliaferro County attending school at Greensboro? A. I don't know the people by name, but I saw them.

Judge Bell: She doesn't know their names. Wait a minute. If there is anything like that going you can re-open the other case. We are not going to try that case today though.

Mr. Moore: I just want to ask her one question—

Judge Bell: The Court has got an outstanding injunction on that.

Q. Did you see kids coming from Taliaferro County?

Mr. Owens: If the Court please—

Judge Bell: You don't have to object. I am getting ready to terminate this now.

Mr. Moore: I have no further questions.

Judge Bell: All right.

Mr. Moore: I have an affidavit from an Instructor in Sociology at the University of Massachusetts. I have given a copy—

Judge Bell: Well, what does he know about Georgia?

[180] Mr. Moore: Well, he has studied the—

Judge Bell: Taliaferro County. Is he an expert on Taliaferro County?

Mr. Moore: Your Honor, he has studied the Census Bureau. He is a Demographer.

Judge Bell: All right.

Mr. Moore: And one additional thing he has done that will save the Court some time. He has figured the percentage in every relevant age group and racial group based upon the Census Report, and we would like to offer his affidavit, Your Honor.

Judge Bell: Any objections to that?

Mr. Owens: Yes, sir, we object to it.

Judge Bell: Why?

Mr. Owens: For \$1.25 one can buy a little blue book that has got all the Georgia statistics in it and of course will speak for itself. It seems to me like we don't need an affidavit from somebody in Massachusetts as to what is in this blue book.

Judge Bell: Well, tell you what we will do—why don't you introduce the Blue Book?

Mr. Owens: We will be glad to, Your Honor.

Judge Bell: We will let him introduce the affidavit and we each one of them such credit as we think they merit.

Mr. Owens: We just hate to burden the court with trying to interpret an affidavit.

Judge Bell: Well, we will check it against the school book. I think we have got some of those that have been put in [181] in other cases.

Mr. Owens: Yes, sir.

Judge Bell: I don't mind having it. I have got a large library.

Mr. Moore: All right, then offer into evidence subject to whatever objection they have as to Plaintiffs Exhibit No. 2, this affidavit of—

Judge Bell: —What is that, the same man?

Mr. Moore: Yes, sir.

Judge Bell: The same affidavit?

Mr. Moore: Yes, sir.

Judge Bell: Oh, you mean you are just offering it now?

Mr. Moore: Yes, sir.

Judge Bell: And your objection, Mr. Owens, will be noted and we will admit and give it such weight as the Court thinks it is entitled to. That will be Plaintiffs' Exhibit 2.

Mr. Moore: Yes, sir.

Judge Bell: All right.

Mr. Moore: We would like to call an additional witness, Your Honor, Mrs. Claudia Richards.

Judge Bell: What is this about?

Mr. Moore: We want to put in for the record the voting list for the last general election.

Judge Bell: Well, why is that important? Why is it relevant?

Mr. Moore: Well, this is the list from which the Grand [182] and Traverse Jurors are selected.

Judge Bell: You just want to offer the voters' list?

Mr. Moore: Yes, sir.

Judge Bell: And it has White and Negro citizens on it?

Mr. Moore: Yes, sir.

Judge Bell: Well, why do you have to have a witness to do it?

Mr. Moore: Well, if she is here I would like to put her up. I don't have the list myself.

Mr. Owens: She says she has got it, Your Honor. She is sitting right here.

Judge Bell: Well, if she has got it in the courtroom she will have to produce it. That's the rule, you know.

Mr. Owens: She has never received a subpoena, if it please the Court, in the courtroom or anywhere else.

Judge Bell: Well, I say that if she has got that list in this courtroom she has got to produce it.

Mr. Owens: All right, sir.

Mr. Moore: We will stand on the information we have got in the interrogatories, Your Honor.

Judge Bell: You have got the statistics then?

Mr. Moore: Yes, sir, we have got the information that they admit there were two thousand—

Judge Bell: —Well, that's enough. You don't want to over-prove your case. That's in.

[183] Mr. Moore: All right, sir.

Judge Bell: Now, wasn't there some other affidavit that you had this morning that you were talking about?

Mr. Moore: We have the affidavit of Mr. Marvin Walton, Custodian of the records of the Southern Regional Council, which list Georgia counties and the relative number of voters by race and percentage of registered voters in each county.

Judge Bell: Well, we don't need that. We only need them in Taliaferro County, and Mr. Turner has already testified that there 949 Negro voters and he also said there were a few more white voters on the list than are actually living and we will of course consider those things. We don't need that. If you want to offer it we will be glad to exclude it. It won't help you one way or the other.

Mr. Moore: Your Honor, we move the admission of all the documentary evidence, move the Court to receive all the answers to the interrogatories and requests for admissions and rest our case.

Judge Bell: All right, you are offering the answers to the requests for admission and you are offering the answers to the interrogatories?

Mr. Moore: Yes, sir.

Judge Bell: Any objection to those, Mr. Owens?

Mr. Moore: That would be his answers.

Judge Bell: I know, but he can object on the ground [184] that some of them may be irrelevant or something like that.

Mr. Owens: We would like to have the right to submit our objections, Your Honor, I can't remember everything in there now. We think that practically most of them are irrelevant.

Judge Bell: Well, we will admit them subject to your motion to strike at a later time.

Mr. Owens: All right, sir. Thank you.

Judge Bell: And that brings us to this point now. Do you have any more evidence to offer, Mr. Moore, that you can think of? Are you about ready to rest?

Mr. Moore: Your Honor, we rest.

Judge Bell: All right. Now, Mr. Owens, do you have any evidence here now that you are ready to to put on, somebody to explain why there is only ten or eleven Negroes out of 130 on the Grand Jury, how you went about doing that?

Mr. Owens: Yes, sir.

Judge Bell: All right, let's get that part of it out of the way.

[185] CLARENCE GRIFFITH, sworn for the defendants, testified.

Direct Examination by Mr. Owens:

Q. Mr. Griffith, will you state your full name and place of residence, please? A. Clarence Griffith, Crawfordville, Georgia.

Judge Bell: G r i f f i t h?

The Witness: Yes, sir.

Judge Bell: All right.

Q. Are you a Jury Commissioner? A. Yes, sir.

Q. And that's for Taliaferro County, Georgia? A. Yes, sir.

Q. When were you appointed as a Jury Commissioner? A. On June 24th, 1964.

Q. And you have served continuously since that time? A. Yes, sir.

Q. Now, I would like to direct your attention to the revision of the Traverse Jury list for the year 1967.

Judge Bell: Excuse me a minute. Are you the Chairman of the Jury Commissioners?

The Witness: Yes, sir.

Judge Bell: You are the Chairman. All right.

[186] Q. And I hand you now what has been admitted as Plaintiffs' Exhibit 1-A and B. You will notice the top is labelled Grand Jurors and the second sheet is labelled Traverse Jurors. Now, first of all will you tell the court who the other Jury Commissioners were who served with you at the time this Traverse list was compiled? A. Mr. Louis

Lunceford, Mr. Milton Taylor, Mr. Reuben Jones, Mr. Guy Beazley, Mr. E. C. Moor and myself. I believe that's right.

Q. What was the source of names that you used in preparing this Traverse Jury list? A. We used the voters' list registration.

Q. For which election? A. It was the previous election, the last one.

Q. The previous General Election? A. Yes, sir.

Judge Bell: Is that the latest list available?

The Witness: Yes, sir.

Q. Now, would you tell the Court in detail just how you and the other Jury Commissioners went about selecting people to serve as Traverse Jurors, that is, putting their names on the list that is before you? A. Well, each one of the members on the Jury Commissioners—the County is divided up in districts—each man was selected from the particular district that he lived in.

[187] Q. The Militia districts? A. Yes, sir, and it was a good representation of the whole county on there.

Q. There were somebody from each Militia District who is a Jury Commissioner? A. Yes, sir.

Q. All right, sir. Now, did all of you meet in some particular place? A. Yes, sir, we met in the Clerk of Court office, Mr. Ralph DeLuke.

Q. Did he have anything to do with your meetings? A. He was serving as our clerk, doing the book work for us.

Q. Now, did you have this list? A. Yes, sir, we had the list and we would call out the names in the districts of the people who were registered on the voters' list in that particular district. I believe Raytown is the first one and Mr. Moore is from that district and—

Q. Your voters' list is divided up into precincts, or is it just an alphabetical list? How was it made? A. I think it was divided up into precincts.

Q. All right, sir, you took it by precincts? A. Yes, sir, and we would go over the names and if he thought they were qualified or would make a good Juror he would ask that their names be put in the box and then the other [188] Jury Commissioners would ask questions about the person, and then if everybody agreed we would put that person's name in the jury box.

Q. Now, sir, what ages were you using as a beginning and ending point for prospective jurors? A. From 21 to 65.

Q. All right, sir, what other qualifications were you using? A. That they be an intelligent and upright citizen, and people that we felt would be capable of interpreting proceedings of court and to render a just verdict and things like that.

Q. All right, sir. Now, prior to today did you know actually how many people of the Negro and White race by number were on the list of Traverse Jurors that's before you? A. No, sir.

Q. When did you first, for yourself, determine how many names on that Jury list were white and Negro persons? A. Just about five minutes after two.

Q. Back in the jury room when I asked you to come back in there? A. Yes, sir.

Judge Bell: Did you discuss putting Negroes on the list when you had your meeting?

The Witness: Sir?

[189] Judge Bell: When you had your meeting of the Commissioners to make up the list, do you re-

member any discussion about putting Negroes on the list?

The Witness: We were instructed to put Negroes on the list.

Q. Who instructed you? A. Judge Stephens, Superior Court Judge.

Judge Bell: All right, sir.

Q. All right, sir, now on that same list, how many names do you yourself identify, the Traverse Jury list, as being those of Negro persons? A. How many did I?

Q. Is this the list that you went by? A. No, sir, this is not the one.

Judge Bell: Mr. Moore picked it up. Didn't you get the list he had in his hand?

Mr. Moore: I took that out to give him the exhibit, Your Honor, because this wasn't an exhibit at—

Judge Bell: —I know, but he has got marks on it, notes on it. Didn't you come over here and get a list out of his hands?

Mr. Moore: I sure did, Your Honor, but that specific exhibit that was introduced is the one he has got.

Judge Bell: I don't care about that. I want him to get the list back in his hands that he had in there. He had some [190] notes on it.

Mr. Moore: I don't see any notes on either one.

Judge Bell: Well, is that the list you got out of his hand? Just hand it to him. Let him look. See if that helps.

The Witness: This is not the list I had.

Judge Bell: We seem to have a great mystery.

Mr. Owens: I gave him a copy we had here.

Judge Bell: Well, give that back to Mr. Moore then.

Mr. Owens: This is the Court's copy here.

Judge Bell: Well, do you think that's the list there?

The Witness: This is the list, yes, sir.

Judge Bell: I asked you how many Negroes there are on the Traverse Jury list.

Mr. Owens: Mr. Moore may have the witness on cross examination, Your Honor, but I would like to finish with him first.

Judge Bell: No, wait just a minute. He is trying to see the notes, and when you get through examining him— Wait just a minute. We are not going to have any trouble between you lawyers. Mr. Moore, you go sit down until he gets through examining him.

Mr. Moore: I just want to see the list, Your Honor.

Judge Bell: I know that, but you go take your seat. I am not going to have any altercation here between lawyers. [191] Mr. Moore, did you understand me?

Mr. Moore: Yes, sir.

Judge Bell: Well, take your seat.

Q. Now, would you compare the list that's in this file with Plaintiffs' Exhibit 1-A and see if they appear to be the same?

Judge Bell: Well, we haven't got time for him to compare all the names on the list.

Q. Now, using the list that you yourself have checked would you tell the court how many names there are of Negro persons? A. 59.

Q. On the Traverse Jury list? A. Yes, sir.

Q. On the Grand Jury list? A. 11.

Judge Bell: In other words, his figures differ on the Traverse by three from what Mr. Turner said?

Mr. Owens: That's right.

Judge Bell: And none on the Grand Jury.

Mr. Owens: That's correct.

Judge Bell: All right. Now, let Mr. Moore look at the list so he can find out whatever it is he wants to know about the notes. Go ahead. Mr. Owens, the court would like to know this: If they made up one Master List and then drew names or took some names someway off the Master List, some for [192] Grand Jury and some for Traverse Jury service.

Judge Scarlett: Do many of those Jurors ask to be excused after they drawn?

Judge Bell: He doesn't know that.

Judge Scarlett: You wouldn't know that. Who does that come before?

The Witness: That comes before the Clerk of the Court, Sheriff and Judge, Your Honor.

Judge Scarlett: In other words, if anybody was drawn and wanted to be excused they would go either to the sheriff or Clerk or who?

The Witness: I think the Clerk of the Court and the Judge excuses them. I am not sure on that.

Judge Scarlett: Well, that's about right, either the Judge, Sheriff or Clerk?

The Witness: Yes, sir.

Q. Mr. Griffith, now lets pass from the preparation of the Traverse Jury list and go to the point where you selected as a group two fifths—

Judge Bell: —Well, did you make up one long Master List of people?

The Witness: Yes, sir.

Judge Bell: Just to be on the Jury service generally?

The Witness: Yes, sir.

Q. And you made that up based on the knowledge of [193] each individual as to his own area in the County, is that correct? A. Yes, sir.

Q. Now, would you tell the Court how you determined who of all of those people would be on the smaller list of Grand Jurors, a copy of which has been shown to you? A. We went through the whole list and picked the ones we thought were the very best people in the county and put them on the Grand Jury.

Q. And put them on the Grand Jury? A. Yes sir.

Q. Did you have any particular standard that you used in selecting those people? A. No sir, we didn't have any particular standard other—other than I mean we wanted the best outstanding citizens in the county.

Q. Now, in preparing that list did you make any determination of whether or not you would include women on the Grand Jury? A. We determined that we would not put women on the grand jury.

Q. Was there any particular reason for that determination? A. Well, some thought there might be cases there that wouldn't be desirable for a lady to hear.

Q. That was the group's thinking? [194] A. Yes, sir.

Q. So, there are no women on the Grand Jury? A.
No women on the Grand Jury list.

Mr. Owens: Now, does the Court have any particular questions along that line?

Judge Bell: None at all. I think he has answered pretty well everything I had in mind. I have been troubled all day since I found out that there wasn't but 11 Negroes on the Grand Jury. That just about makes out a case of systematic exclusion of Negroes based on their race, and you have explained that by saying that you picked the best people.

The Witness: Yes, sir.

Judge Bell: But the law of Georgia is and the law of the United States is that you have to have a fair representation of people in the community on your jury list, and that also applies to the Grand Jury list, and so actually this case started out being a complaint that there weren't any Negroes on the school board, and now it has got down to the Jury system and I expect you are in pretty bad shape on that point. If there is anything on it that you want to bring out you may do so.

Judge Scarlett: That's the reason I asked the question a few minutes ago. Don't juror after juror, whom you draw, go to the sheriff or the clerk or the Judge himself and get excused?

The Witness: I don't know, Your Honor. I know I have been in court and hear the Judge or the Clerk say they have been [195] excused.

Judge Bell: When Judge Stephens gave you a charge on how to get your list up, did he give you a copy of the new laws?

The Witness: Yes, sir.

Judge Bell: And you made the list up?

The Witness: Yes, sir.

Judge Bell: You never have given him any report on how many Negroes or how many Whites are on the list?

The Witness: No, sir.

Judge Bell: I believe you said you never had counted them?

The Witness: No, sir.

Judge Bell: Not until today?

The Witness: No, sir.

Judge Bell: All right, that's about all we want to hear.

Judge Scarlett: The reason I asked the question, because since I have been Judge and that has been twenty odd years, why, down in my home county, we have several jurors drawn, of course, it is a little different from this, and when I get home in Glynn County and court is coming up this next week my telephone rings almost continuously and I excuse all that I can excuse. Sometimes the Clerk doesn't like it much because I excuse so many. A man comes to me and tells me that he has got a sick [196] child or anybody is sick or for business reasons—I don't make it a rule to excuse for business reasons, but if they have got a real good business reason whereby they would suffer a loss, I will excuse them. I bet every other Judge does the same thing, and I am not running for office either.

Judge Morgan: May I ask this question: This is apparently new law which has been enacted in 1967.

Do you make any written inquiries to any of those you have selected as Jurors as to their age, occupation, or the race, etc.? In other words, does your clerk, before placing them on that Master List make an inquiry from either the jurors or the Grand Jurors, or do you just place them on there without inquiry?

The Witness: We just place them on there without inquiry.

Judge Morgan: How would you know whether a person was 18, 19 or 20 years old?

The Witness: Well, Taliaferro County is a small county, and we know just about everybody—I mean I don't know everybody in the County, but the man that is on the Jury Commissioners from the other districts would know the people in his district.

Judge Morgan: In other words, it is your testimony that between the six of all of you would know every juror individually whom you placed on that list, either the Traverse Jury or the Grand Jury?

[197] The Witness: No, sir, I wouldn't say that I knew everyone.

Judge Morgan: I mean one of the six?

The Witness: Yes, sir.

Judge Morgan: All right.

Judge Bell: Well, I guess that covers everything the Court had in mind.

Mr. Owens: Excuse me just a minute.

Judge Bell: All right.

Mr. Owens: We have no further questions.

Cross Examination by Mr. Moore:

Q. Mr. Griffith, how many districts are there in your county? A. I think it is nine. I am not sure of that now.

Judge Bell: Well, it would be more than six, because there are 1858, or some such number in the state, so it would be more than six.

Q. And Militia District 606 is an all black district, isn't it? A. I don't know.

Q. Are there any Jury Commissioners from District 606? [198] A. I don't know where District 606 is at.

Judge Bell: Well, don't over prove your case, Mr. Moore.

Mr. Moore: Your Honor, we don't have any further questions.

Judge Bell: All right, Mr. Evans may have something.

Mr. Evans: No, Your Honor.

Judge Bell: All right.

[199] Judge Bell: Now, is there any other matter that the Court inquired about? You are going to send us those records later, the minutes and the legal advertisements?

Mr. Owens: The Court asked if any of the grandchildren of the present members of the Board of Education went to this private school?

Judge Bell: Right.

Judge Scarlett: I made an inquiry about that at the time you asked the question, did I not?

Mr. Owens: Yes, sir.

Judge Scarlett: I had my doubts about it.

Judge Bell: Now, the case with the shape it is in Mr. Bloch, we don't want to deprive anybody of any rights, but since we have this Waynesboro case,

the Burke County case, set at Brunswick on the 23rd of February, the Court will recess this hearing and pass it over to that same day at Brunswick. If you have any evidence that you care to offer at that time you may do so, anybody in behalf of the defendants. In the meantime the Court is tentatively inclined to grant your motion as to those persons named defendants who allegedly represent the grand jurors. Now, that depends finally on the remedy we have to work out. Now, assuming that the plaintiffs have made out a *prima facie* case of systematic exclusion, based on race, as to the grand jury list, I think you ought to be prepared, when you come down to the Brunswick hearing, to suggest a remedy. [200] How would you go about remedying this situation. The Court wouldn't care to put anybody under an injunction unless it was necessary. This could be an accident on the part of these Jury Commissioners that there is systematic exclusion. I don't know what procedures, you could set up in the meantime to get this systematic exclusion problem cured. It may be that you can cure it before the 23rd of February, if not, we will have to look into it further, but I am sure that no lawyer on either side wants this condition to go on. We all know what systematic exclusion is, and when there is as many registered Negro voters in a county as whites and you have 130 to 11 on the grand jury, why, that's systematic exclusion, and that will have to be corrected. Now, that's one thing.

Now, on the question of damages the Court is not prepared to rule on that. We haven't read Mr. Moore's brief and, off hand, I have been in a lot of these cases and I have never heard of any such

damages, and I don't know much about ancillary damages, but I have heard of costs being awarded, but we will hear more about that. You can answer that, Mr. Bloch, that portion of his brief, between now and the 23rd. We will rule on that motion then.

I expect the evidence is actually closed but there may be somebody wants to offer something else on the 23rd and for that reason, just out of the abundance of caution we will keep the record open.

[201] Now, on the main question, which is that there are no Negroes on the Board of Education. I don't know just what the Court can do about that, but I know that there is no one here that's a party defendant that would think that situation can continue. That just simply will not do. Now, how it can be worked out, I don't know. It is a bad thing in this country to call on the courts to solve all the problems. If you can govern yourselves, the citizens ought to solve some problems, and it may be that between now and the 23rd you can work out some way to solve the situation. There are two places, as I see it, on the School Board that have not been permanently filled. There are two men who have been elected by the school board but the grand jury hasn't confirmed them. If those two men would willingly stand aside the other members might select two outstanding Negro citizens who are land owners and good citizens to go on the Board. If you don't want to do that—I told you in the beginning that this was a pretrial conference as well as a hearing, if you don't want to do that we will know that on the 23rd. If you can do that, it will be an act of statesmanship on the part of somebody who is able

to get something like that done; but you all are living in the county together and some how another you are going to have to keep living in the county together, and you can't have an all Negro school and all white school board, because somewhere along the line some court will do something about that. I guess this is the [202] first case of this kind that has come up, but just by second nature almost to a judge now knows that that sort of thing can't continue, so the Court would hope that the citizens of Taliaferro County can solve these problems themselves, and that when we get down to Brunswick that we could terminate this matter by the grand jury list having been re-constituted and some relief having been granted to these Negro citizens about their schools. If they had somebody on the School Board they could get a hearing. You have got a right to get a hearing before any public official. And every Negro has got the same right, identical rights, as any white person before any officer of the law. We all know that. Now, we are going to leave the case in that posture, at that juncture, and set it over until February 23rd at 9:30 in Brunswick, and I hope by that time we will have the Taliaferro County situation worked out. Mr. Bloch you are a fine lawyer and an experienced man in this sort of thing and I think it is time for the people to work this out. There will be communication. All you need is for somebody to get in an office somewhere and you will have plenty of communication.

Now, Mr. Fulcher and Mr. Lewis, what I have said about the Taliaferro County situation—we don't know anything about the Burke County situation, but

what is it—a word to the wise is sufficient unto the day, or something like that; so you can be thinking about that too before you come down there, because the same situation exist in Burke County. You have got Negro [203] citizens and White citizens and have been there a long time and have got to live together some way another, so lets try to have a spirit of harmony and work some of these things out, and lets don't let the Courts have to solve everything because that's no solution in the end. The solution has to come out of the hearts of the people, the people that live in a place, so lets try to work that out. All right, Mr. Bloch.

Mr. Moore: I would like to be heard—

Judge Bell: Wait a minute. Mr. Bloch was standing up first.

Mr. Bloch: If the Court pleases, we will bear those admonitions in mind and consult with our clients and see what can be done.

Now, as I view the question of the grand jury it may be necessary for us to study what Your Honor has said for the Court in connection with the law as laid down in the Swain case, and what Your Honor, Judge Bell, said of the Swain case in—

Judge Bell: —All right.

Mr. Bloch: —with those as the yardstick and see if we are in violation of the rule therein announced and, if so, see what can be done about it.

Judge Bell: Well, now bear this in mind, there is a Supreme Court decision a good many years ago in which Justice Jackson filed a concurring opinion in which he said you could file suit under one section of the old Civil Rights Act to enjoin [204] a

jury system that was illegally composed, that you don't have to wait until somebody is on trial, so that would give the court jurisdiction, if we have to get to that point; but you will have to advise your clients what the law is on that, what is a legal composition of a grand jury, but the Court would hope that you would be generous in your composition.

Mr. Bloch: Well, I will do my best to be generous. Now, there is another question, Your Honor, the 23rd is a month off. Does the Court have in mind formally ruling on the motions that we have filed prior to the 23rd? I ask that because I want to know whether we shall file an answer before the 23rd.

Judge Bell: My own inclination would be to grant your motion as to the grand jury, or the juror defendants, not the Jury Commissioners, to dismiss them on the grounds they have not stated a cause of action against them because they are not—they can't represent an entity. It is like suing citizens on the street to represent everybody. For example, there are 11 Negroes on the Grand Jury list, and if you got damages they would have to pay part of the damages. There are 59 Negroes on the traverse list and if you got damages you would have to assess damages against them too, if you are proceeding against the jurors.

Mr. Bloch: It would be my thought, if the Court could conveniently do it within the next week or so, make a formal ruling then we would go ahead and file our answer—

[205] Judge Bell: —Well, I think probably we will overrule all of your motions—

Mr. Bloch: —Sir?

Judge Bell: I think probably we will overrule all of your motions, I believe, except—just thinking out loud—except the damages. I would prefer to postpone a ruling on that because we have not studied it enough, but on the juror defendants you can prepare an order—Mr. Moore wants to be heard on this—but you can prepare an order sustaining your motion on that.

Mr. Bloch: On the damages?

Judge Bell: No, on the jurors.

Mr. Bloch: That's 12(b) as to the jurors.

Judge Bell: Yes, but just wait right there. Mr. Moore wants to be heard from on that one motion.

Mr. Bloch: Then can I come back?

Judge Bell: Yes. Now, Mr. Moore, just argue on this one point about the jurors.

Mr. Moore: Your Honor, it is my understanding from the Court's discussion this morning that the Court expressed some concern as to whether or not we could sue an individual member as representative of a class.

Judge Bell: In the juror class.

Mr. Moore: In the juror class.

Judge Bell: All right.

[206] Mr. Moore: It is our contention that we can sue them, and it is our contention under *Mandez* against Texas that the Grand Jury of Taliaferro is an identifiable fact.

Judge Bell: A grand jury is but you have not sued a grand juror. You have sued people on the grand jury list. You can't seem to get the difference.

Mr.: Your Honor, then the proper remedy would be to dismiss the plaintiffs' claim but rather have the plaintiffs, who have made out a substantial cause against the grand jury there, an opportunity to plead in additional party defendants who are jurors.

Jud.: And then when you get to that point, at the point on the bridge, then the question would be, what relief are you seeking from the grand jury? Only relief you could possibly seek would be to try to require them to appoint Negroes to the board, and we have just finished determining that the grand jury is mal-constituted. What can a mal-constituted grand jury do?

Mr.: Your Honor, two things I would like to say. First is that we sued the grand jury list in the manner that we could sue air rights over a parcel of land in Fulton County, Georgia. We sue the grand jury list and the existing defendants remain in the case as the defendants on whom the suit is served so that the grand jury itself would have notice that the suit is brought, and—

[20] Judge Bell: —Well, the Jury Commissioners are the ones that are responsible.

Mr.: Secondly, Your Honor, we attack Section 106 of the Code.

Jud.: What is that?

Mr.: This is the statute which provides for the selection of so-called upright and intelligent citizens for jury service.

Jud.: Well, that's the Jury Commissioners.

Mr. Moore: No, sir, that's not the jury commissioners. The Jury Commissioners are back a step further. They fall under Section 59-101 because they are invariably white free persons in the county. We attack that statute. We attack as a ground for injunctive relief Section 59-106, that it is a vague and indefinite statute, the result of which leads to Negro exclusion in the jury process.

Judge Bell: Well, now, here is the thing about it, just as a practical matter, Mr. Moore: Any relief, major relief you are seeking, can be obtained against school board members and against jury commissioners. Now, there is no sense on earth in making these three grand jurors that you just happened to pick out of the air hire a lawyer, go to the expense of going to Brunswick and proceeding along in this, that is just punitive almost. As far as I am concerned, if the other Judges agree to it, we are granting their motion, we are going to get them out [208] of the case. We are going to separate the wheat from the chaff, and we are going to keep the wheat in.

Judge Scarlett: I agree to that.

Mr. Moore: Then I move that we be permitted to name the grand jury list.

Judge Bell: We have already tentatively ruled that the grand jury is mal-constituted.

Mr. Moore: We would like to name that mal-constituted list.

Judge Bell: No, you don't need to name anybody else, or get any more people having to hire lawyers. These are just little people tending to their business.

and they haven't got to go about over the state following lawyers around and hiring lawyers.

Judge Morgan: The Jury Commissioners are responsible for the mal-apportionment of the grand jury list.

Mr. Moore: Then the grand jurors want to inforce the statute, but I have a question, Your Honor—

Judge Bell: What statute have they inforced?

Mr. Moore: They inforced statute 52—

Judge Bell: —Well, lets don't just call off numbers. What is it about?

Mr. Moore: They select the school board members.

Judge Bell: All right.

[209] Mr. Moore: Your Honor, I have a question I would like to ask.

Judge Bell: All right, what is it?

Mr. Moore: If I understand it correctly, if the Court strikes these grand jurors, would our claim that the statute 59106 was unconstitutional would remain in the case?

Judge Bell: It would be right in the case.

Mr. Moore: Well, Your Honor, the proper motion would not be to dismiss under Rule 12(b) for failure to state a claim, but rather to strike these particular named defendants.

Judge Bell: Well, I don't care how you get it done, as long as you get these men out of the case, because you are just dragging them along in the case. I tell you what you can do, Mr. Bloch, you just prepare an order and say these three men, Durham, Bacon and somebody else, named as representatives of the jurors are stricken by order of the court.

Mr. Bloch: Fouche, Durham and Bacon.

Judge Bell: All right, say they are stricken by order of the court, put three names on it, and we will sign it.

Mr. Bloch: Do you want to do that today?

Judge Bell: No, sir, you can send it to us.

Judge Scarlett: Well, why don't you get it done today?

Judge Bell: Well, we have got a typewriter problem. You can mail it to us. Now, that is all that is taken out of the case, that one thing.

[210] Mr. Bloch: I understand. I am going to suggest this somewhere between now and the 23rd, too—

Judge Bell: —All right.

Mr. Bloch: Whether the mal-function—well, not mal-function, but mal-apportionate of a grand jury is a question for any particular county in a state is a question within the jurisdiction of a three-judge court.

Judge Bell: Yes, sir, I believe it is. If the court, under this decision Justice Jackson, which we all know is one of the best judges we have ever had—

Mr. Bloch: Did you say Justice Jackson?

Judge Bell: Justice Jackson. It is a concurrent opinion that he wrote in the case in which he said he was getting tired of entertaining appeals on systematic exclusion in criminal cases. He says, what somebody ought to do is to proceed under, I think he said Section 1983, Civil Rights, and enjoin these mal-constituted juries. Now, he was a good judge and that was a sensible thing to do. Now, if we have

got jurisdiction to do that, then we have got jurisdiction to say that it is mal-constituted. We wouldn't make that retroactive, if we were to enter such an order, but they would just have to quit doing business in the future is all until they get it straighten out. It's no problem to straighten this out. These Jury Commissioners can get together and straighten it out.

Mr. Bloch: Well, of course, if you straighten it out [211] all these questions would fall by the wayside.

Judge Bell: That's right.

Mr. Bloch: But I am assuming, as a lawyer must assume, that it may not be straighten out, and then what I have got to do—

Judge Bell: —It won't be retroactive.

Mr. Bloch: Then that brings up the question: "When do I have to file my answer?"

Judge Bell: Well, I can't imagine anything that you haven't answered in these interrogatories, but you don't have to file your answer until we rule on the motions, so if you don't want to answer, you don't have to answer.

Mr. Bloch: O. K.

Judge Scarlett: That was what you were trying to find out, wasn't it?

Mr. Bloch: Yes, sir.

Judge Bell: You don't have to answer until we rule on all motions. All right.

Mr. Moore: May I make a suggestion about the hearing in Brunswick?

Judge Bell: What is it?

Mr. Moore: I would like for all parties to be required to notify each other within, say, five days of the hearing if they are going to put on evidence.

Judge Bell: I think that would be fair enough. That [212] will work both ways. I can't imagine what evidence would be, but if you are going to put on any, each side give the other side notice within five days prior to the hearing who you are going to put on. But don't come down there, Mr. Moore, if the Court wants to hear a witness, and say we can't hear one because you haven't had five days notice or something. These are sort of free wheeling hearings.

Mr. Moore: Yes sir.

Judge Bell: We get the evidence up as we need it.

Mr. Bloch: That is just like a pretrial ruling that a witness shall not be used on a trial unless the other side has five days notice.

Judge Bell: Right, but that doesn't apply to the court.

Mr. Moore: I would like to have copies of any records they file in court.

Judge Bell: Oh, you know they are going to give you notice of anything they file. No reason to worry about that. The hearing is adjourned until 9:30 on the 23rd of February at Brunswick, Georgia.

The Court: Now, is there anything else before we go?

Mr. Bloch: The Court has not ruled on the damage question?

Judge Bell: No. We haven't read Mr. Moore's brief.

Mr. Bloch: Oh, I see. So I have got to file a reply brief.

[213] Judge Bell: That's right. When we get through studying Mr. Moore's brief and get your reply brief on the question of ancillary damages—Now, you are going to find some cases where the Court has been awarding attorney fees and costs to various counties in some school cases in the Fourth Circuit, but so far as I know there has been no such rulings in the Fifth Circuit, but it has been done in the Fourth Circuit, but as I understand it he is not claiming any cost by way of Attorneys' fees. He is claiming a half a million dollars in what he calls ancillary damages which he says can be awarded without a jury trial.

Mr. Bloch: He has got a list of cases in page 35 and 6 of the brief which I have got to study.

Judge Bell: I would imagine that both of those cases were back in Star Chamber days in England which might have been some sense then, in which they said, I believe, "equity was as long as the Chancellor's foot."

Well, if there is nothing further, this case will stand in recess until February 23rd.

The Marshal: Take a recess until February 23rd.

**Transcript of Proceedings at Brunswick, Georgia
February 23, 1968**

[2] Judge Bell: All right, Gentlemen, we will take up the case of Calvin Turner Vs Fouche and others. We had another case set for today but we continued it at the request of the County Attorney of Burke County because he was in the Legislature and he couldn't get prepared and that case was continued several days ago, so this Turner case is the only matter we have. There were several motions that were undisposed of and in addition to that there has been other briefs filed on the same questions we had before except—well, we do have briefs on the damage question Mr. Bloch and Mr. Moore. There was speculation that we might have more evidence this morning, and each side was to give notice to the other side if they had additional testimony, and Mr. Bloch did write a letter that he would have some additional testimony, and we will hear from you, Mr. Bloch.

Mr. Bloch: If Your Honor please, I wrote the letter in conformity with the order of the court—may I stand here?

Judge Bell: Yes, sir.

Mr. Bloch: I wrote a letter in the thought that there might be some additional testimony needed but so far as the defendants are concerned I have here a Report to the Court to just what has happened factually since the Court recessed in Augusta. I would like to read it to the Court, while there are three copies.

[3] Judge Bell: It has something to do, no doubt, with the fact that the Court put you in charge of seeing whether you could work the problem out.

Mr. Bloch: Yes, sir. I think I can skip the first part of it because it is a part of the record at the conclusion of the hearing in Augusta.

Judge Bell: All right.

Mr. Bloch: On January 25th Circuit Judge Bell stated from the Bench—

Judge Bell: The Court wanted you to find out what the law was.

Mr. Bloch: Yes, sir, and the Court knows what that statement was and I will skip on over to page 3.

Judge Bell: All right.

Mr. Bloch: And start with the paragraph subsequently:

"On his own motion on the 26th day of January, 1968, the Honorable Robert L. Stephens, Judge of the Superior Court of Taliaferro County, Georgia, promulgated an order reading as follows:

Georgia, Taliaferro County. A Three Judge Court, Federal Tribunal, involving the County Board of Education and the Taliaferro County Board of Jury Commissioners, et al., on the 23rd day of January, 1968, having orally advised that the Traverse and Grand Jury Master List be revised in Taliaferro [4] County, Georgia, it is ordered as follows, to wit, that the Grand Jury of Taliaferro County, Georgia, drawn to serve at the regular February Term, 1968, of the Superior Court of said County be and they are hereby discharged from serving at said term of court, and the Sheriff of said County is ordered not

to serve them to appear at this term of court, it having been orally ordered by said Federal Court Tribunal that the Grand Jury Master List is improperly and unlawfully constituted; that the Jury Commissioners or Revisors of Taliaferro County, Georgia, revise both the grand and traverse jury list for said County to comply with the oral pronouncement of said Federal Court Tribunal, said list heretofore composed declared to be improperly and illegally composed. Said revision shall be made at the earliest and most convenient time.

It is ordered that this order be spread upon the minutes of the Court by the Clerk of said Superior Court.

This 26th day of January, 1968. Robert L. Stephens, Judge of the Superior Court, Taliaferro County, Georgia.

This order was filed in the office of the Clerk of the Superior Court of Taliaferro County on January 26th, 1968, and recorded in the Minutes of the Clerk of Superior Court in Book "L", Page 57, on that date. January 26th, 1968 was a Friday. Having heard of the order the Jury Commissioners consulted with their counsel in Macon practically simultaneously with its promulgation. As a matter of fact, it was the day before.

[5] The Jury Commissioners met beginning on a Monday following the order, to wit, January 29th, 1968. They had for their consideration a list of persons who were registered to vote in the last General Election. That list contained a total of 2,152 names. We are advised the Jury Commissioners con-

sidered each and every name in that list. When the Commissioners did not have any information with respect to a particular individual they asked other people in the community about him or her in particular when they did not know about persons of the Negro race they asked Negro people about them. In considering each and every name they eliminated the following numbers of names without regard to race for the following reasons:

Poor health and overage 374. Under 21 years of age 79. Dead 93. Persons who maintained Taliaferro County as a permanent place of residence but were most of the time away from the County 514. Persons who requested to be eliminated from consideration 48. Persons about whom information could not be obtained 225. Persons of both the White and Negro race who were rejected by the Jury Commissioners as not conforming to the statutory qualifications for juries, either because of their being unintelligent or because of their not being upright citizens 178. Names on the voters' list more than once 33. This left a total of 608 names. Since 608 names are more than the Jury Commissioners deemed to be needed in the traverse box they arranged these 608 names in alphabetical order [6] and took every other name on the list alternately and placed those names in the traverse jury list. This left a total of 304 names and only then did the Commissioners look to see how many of these 304 names were those of Negroes and how many of those were White. They determined that 113 were Negroes and 191 were White. Their next task was to select

not more than two-fifths of this traverse jury list for the grand jury list. They decided that the fairest system would be to draw names by lot. They drew a total of 121 names by lot and put these names on the grand jury list. Having done that they looked to see how many were the Negro race and how many the White race. They ascertained that 44 were the names of Negroes and 77 were the names of White. After the new Grand and Traverse Jury List had just been completed and after all the names had been put in their respective jury boxes a new grand jury was drawn by the Honorable Robert L. Stephens, Judge of the Superior Court of Taliaferro County, Georgia, in the manner provided by law. A total of 32 Grand Jurors were drawn by Judge Stephens, nine of whom were Negro and 23 Whites. That Grand Jury convened on Friday, February 16th, for the purpose of considering the regular business of the court and for the purpose of confirming or rejecting persons who had been selected by the Board of Education of Taliaferro County, Georgia, to succeed Horace E. Williams, Jr. whose term expires August 25th, 1968, Mr. Williams having resigned and to succeed Albert Drinkard, deceased, for a term to expire [7] August 23rd, 1969. Casper Evans, Sr., a Negro, had been chosen by the Board of Education to serve until the next meeting of the Grand Jury and Moore Pitman, of the White race, had been chosen by the Board of Education to succeed Albert Drinkard, deceased, for the term expiring August 23rd, 1969. These elections or selections or choices by the Board of Education were

confirmed by the Grand Jury, thus constituting a selection in accordance with the law. The Grand Jury actually serving consisted of 23 Grand Jurors, 17 of whom were whites and 6 Negroes.

Respectfully submitted.

And there is an appendix to it, Your Honor, a table, showing a summary of the same information contained in the body of the report.

Now, all of that, of course, as reported to the Court by me, is hearsay. It comes from my clients with the exception of the conference in Macon where they consulted with us as to what we thought were their duties under the law in accordance with the oral instructions of this Court. So, the reason I gave notice of perhaps having more testimony was that if there is any question, or if the Court wanted to propound any question to the Chairman of the Jury Commissioners or to the Vice Chairman of the Board of Education that they would be here.

Judge Bell: All right. The Court would like to have this summary in evidence, and the question would be "how would we get it in evidence? I suppose the Chairman of the Jury Commissioners [8] could testify as to the way it was done. Mr. Moore, I wonder if you would stipulate that this was the way it was done, with the right, of course, to cross examine.

Mr. Moore: Your Honor, we object to the report in toto on the ground, one, that it is hearsay. Two, that it is inadequate to secure the constitutional rights involved in the statutes, and, third, on the ground the report obviously shows how these statutes constitute provisions to create constitutional—

Judge Bell: —Well, I didn't ask you about that. Why don't you try to answer my question? I am trying to figure out how to get this in evidence.

Mr. Moore: Your Honor, I don't want to be bound by this Report, and I don't want to consent to what has been done in Taliaferro County by any of these whatsoever.

Judge Bell: I understand.

Mr. Moore: Your Honor, this is a slap in the face and is indicative of the fact that the system is totally and thoroughly rotten.

Judge Bell: What's wrong with the system? This is what we had the hearing about to try to get some relief in the situation.

Mr. Moore: Your Honor, we have argued that and have demonstrated in our brief, and I don't think I need to reiterate what is fundamentally right. It shows on the face of the Report what's wrong with the system.

Judge Bell: In other words, you are standing on your [9] attack on the Code Section, the constitutional provision?

Mr. Moore: Yes, sir.

Judge Bell: I understand that. You are not willing to shorten the proceedings by saying that if the Chairman of the Jury Commissioners testify he will testify to what is in this Report with you having the right to cross examine him.

Mr. Moore: Your Honor, I think we were under the impression that witnesses were going to be introduced here and whatever this Report is worth it could have been mailed to counsel and we could have

it prior to this hearing. It was not sub-
 us prior to this hearing. As a matter of
 nk it was conducted some time in January.

Bell: Well, they said they had a meeting
 y, something about the school board mem-
 did not know that they had appointed a
 mber of the School Board.

ore: I didn't get any information of that
 om the defendants.

Bell: You didn't know anything about it.

ore: I didn't know it from the defendants.

Bell: I say, did you know about it?

ore: I didn't really know about it.

Bell: Well, did Mr. Turner know about it?

ore: I will ask him.

Bell: All right, ask him.

. Moore: Your Honor, he didn't have any
 nouncement.

Bell: Oh, I know that. I know that he has
 any official announcement. But who would
 t an announcement? The Grand Jury usu-
 make any announcement until the end of

ore: He didn't know about it.

art: He didn't know about it.

ore: He didn't know about it. Period.

Bell: Well, Mr. Bloch, to get this into evi-
 will have to put the Jury Commissioners
 Gnd.

ch: All right, sir. Take the stand, Mr.

Bell: Let him be sworn and take the stand.

[11] C. A. GRIFFITH, called as a witness for the Defendant and after having been first duly sworn the truth, the whole truth and nothing but the truth to tell, testified as follows:

On Direct Examination by Mr. Bloch:

Q. Will you state your name, please? A. Clarence Griffith.

Q. Are you Chairman of the Jury Commissioners of Taliaferro County? A. Yes sir.

Q. Were you so, or have you been such for the past several months? A. Yes sir.

Judge Bell: Mr. Bloch, excuse me a minute. Do you have a copy of this order that Judge Stephens promulgated?

Mr. Bloch: Yes sir, a certified copy.

Judge Bell: Well, you are going to offer that into evidence?

Mr. Bloch: Yes sir.

Q. Did I give you last night a copy of the proposed report to the Court and counsel for the remaining defendants in this case? A. Yes sir.

Q. Have you read it over? [12] A. Yes sir.

Q. Do you have a copy of it before you? A. I do.

Q. On page three there is what purports to be an order of Judge Robert L. Stephens, Judge of the Superior Court of Taliaferro County, Georgia? A. Yes sir.

Q. Have you got a certified copy of that report with you—I mean order? A. Yes sir.

Q. Would you let me have it please? A. Yes sir.

Mr. Bloch: So I won't forget it, I tender a certified copy of the order marked Defendant's Exhibit No. 1.

Judge Bell: Mr. Moore, do you object to that?

Mr. Moore: No sir, I am not objecting. I just want to check something.

Judge Bell: Well, you are not objecting to it?

Mr. Moore: No sir.

Judge Bell: Do you call Defendant's Exhibit 1?

Mr. Bloch: Yes sir.

Judge Bell: All right, go ahead. That will be admitted.

Q. You had a chance last night to read over the balance of this report very carefully? A. Yes sir.

[13] Q. At the top of page 4 is a statement "having heard of the order", referring to the order of Judge Stephens, the Jury Commissioners consulted with their counsel in Macon practically simultaneously with the promulgation—as a matter of fact, that conference was on January 25th, on a Thursday, was it not? A. Yes sir.

Q. In our office in Macon? A. Yes sir.

Q. Now, with respect to all the rest of the report, are the statements of fact contained therein true? A. Yes sir.

Q. All right, sir.

Mr. Bloch: I offer this into evidence as Defendant's Exhibit No. 2.

Judge Bell: Wait a minute and let me glance over this. There is not anything in this report that this witness wouldn't know about. Now, let's see, we are down to the Jury Commissioners' meeting. Now, you don't know anything about drawing the grand jury? You wouldn't have anything to do with that?

The Witness: No sir. We made the list.

Judge Bell: You made the list?

The Witness: Yes sir.

Judge Bell: I know, but as I understand the Georgia law Judge Stephens goes in the court room and draws them out in public, [14] in the presence of the sheriff and clerk or anyone else who might be in the court room.

The Witness: Yes sir.

Judge Bell: That's on page 5. That is something that the witness wouldn't know about. Through the second paragraph on Page 5 he knows about it. Wait a minute, let me see.

Mr. Bloch: If we have to go into the proof of that Judge Stephens is here.

Judge Bell: All right.

Mr. Bloch: And the Chairman of the Board of Education is here, and we make proof of them for cross examination. Wouldn't that do it, Your Honor?

Judge Bell: I think it would. This witness can testify that those parts of the report that he was associated with, or had anything to do with, are true?

Mr. Bloch: Yes sir.

Judge Bell: All right, now, Mr. Moore, you can go ahead and cross examine him. That's down through the second paragraph on Page 5.

Mr. Moore: All right, Your Honor.

Cross Examination by Mr. Moore:

[15] Q. Did you consider any other source for names for Grand Jurors other than the Voter Registration List?

A. No, we did not.

Q. You did not go out in the community and determine whether or not there were persons of other identifiable groups who had not been included on the Grand Jury List?

A. No.

Q. Did you confine or limit your examination to the selection of persons eligible for jury service strictly to the Voter Registration List? A. We did, yes sir.

Q. Can you tell me the number of persons who were struck for poor health or over age of the Negro race? A. No, I could not.

Q. Did you make an examination or determination to find out the number of persons who were struck? A. No. Yes, I beg your pardon, 374.

Judge Bell: Just a minute, Mr. Moore. The Report says that they examined the names of every one on the Voters List of 2,152 people, so they had to make some investigation.

Mr. Moore: Yes sir, that is what I am trying to get at.

Judge Bell: If you examine every name on the list then you have investigated, or at least examined it, whatever that means.

Q. How did you determine that a particular name was [16] that of a person who was in poor health? A. Well, there were five other members of the Jury Commissioners. Taliaferro County is a small county. We also had three Negroes that we brought in to work with us one afternoon and from the information from the Jury Commissioners of those that were known to them and other people that we brought in we had a good idea of the people.

Q. When you say you brought in three Negroes, were they appointed Jury Commissioners? A. No, they were not appointed Jury Commissioners.

Q. They were not Jury Commissioners? A. No, they were not.

Q. They were brought in as advisors? A. They were asked to come in and help us to do what we thought were doing right.

Q. Now, what were the names of those Negroes that you brought in? A. Willie James Hughes.

Q. All right. A. Margie Hughes and John Short.

Q. What does Willie James Hughes do? A. What does he do?

Q. Right? A. Well, we selected Willie James Hughes because [17] he is an insurance agent and he goes all over the County and that is the reason we selected him.

Q. Does he have an office in the county? A. What?

Q. Does he have an insurance office in the county? A. I think he does.

Q. But you don't know, do you? A. I know that he does, yes sir.

Q. Margie Hughes, who is she? A. She is Willie James Hughes' daughter-in-law. She sells Avon Products and she also, in our opinion, had a knowledge of the people in the county due to the fact that she travelled about the county.

Q. How about James Short? A. James Short—

Judge Bell: —I thought you said John Short.

The Witness: John Shorter.

Judge Bell: Shorter or Short?

The Witness: S H O R T E R.

Q. What does he do? A. He is employed by the Board of Education, I believe.

Q. By whom on the Board of Education? A. Just employed by the Board of Education. I don't know his job.

[18] Q. You don't know whether he is employed by the Superintendent or not, do you? A. I don't know whether Superintendent hired him or not.

Q. Now, how old is Willie James Hughes? A. I do not know.

Q. Well, is he a young man, or an old man, or what? A. I would say that he is a middle age man.

Q. Did you get a chance to see him, look at him? A. Sure I see him. I see him every day.

Q. All right, how long have you known him? A. All of my life, 37 years.

Q. Pardon me?

Judge Bell: He said 37 years.

Q. Are you and he friends? A. Yes, we are friends.

Q. Is that true for his wife, Margie Hughes? A. Not his wife, his daughter-in-law. I have known her all of my life.

Q. Two of your friends? A. That's right.

Q. Are they considered Negroes that you can trust? A. Yes.

Judge Bell: What does that mean, Mr. Moore. I would [19] hope, if I were a Negro, that I could be trusted. What do you mean by that? What is the connotation of that statement?

Mr. Moore: By that, I mean, Your Honor, they are Negroes that white people know will not stir up any trouble.

Judge Bell: He was asking you something altogether different than what you thought he was asking you.

The Witness: I know Willie James Hughes. He is a respected Negro citizen in the Taliaferro County community. White people and colored people will testify to that.

Q. You have never known him to agitate for Civil Rights, have you? A. Have I ever known him to agitate?

Q. That's right? A. Not to my knowledge.

Q. The same thing is true as to his daughter-in-law, isn't it? A. I don't know of anybody that is agitating for Civil Rights.

Q. How about Calvin Turner, the Plaintiff in this case? A. I don't know that Calvin Turner is an agitator.

Q. But you know that he speaks out about his rights in Taliaferro County? A. That's his privilege.

[20] Q. And he exercises it, doesn't he? A. That's right.

Q. These Negroes that you had advising you about the Grand Jury, they don't exercise this privilege in the county do they? A. I think they do.

Q. Have you ever known them to take a stand? A. Yes.

Q. On what?

Judge Bell: Wait a minute. Just a minute. Do you think if they have foregone their right of free speech or freedom of religion? Just what do you have in mind, Mr. Moore. I don't understand this line of questioning.

Mr. Moore: Obviously, these Negroes are what they call "Uncle Toms."

Judge Bell: Well, why don't you prove that then? Put on a witness and prove that or let him say that and then we will decide whether or not we want to let that testimony in.

Mr. Moore: All right, Your Honor.

Judge Bell: If you want to ask this witness a question about somebody's reputation as to a law abiding citizen or an Uncle Tom then ask him. Don't have a lot of innuendos in your question and then come along later on with a brief and say that this man testified that this man said these people could be trusted and therefore they are a White [21] man's Negro or something like that. If you are going to ask this witness a question, you ask him so he will understand the question. I know what you are trying to do.

Mr. Moore: I can't ask him everything. I have to ask him—

The Court: —Well, the Court is pretty well aware of what you are aiming at.

Q. Do you know whether or not the Negroes you have just mentioned in your testimony have the reputation over the County of being Uncle Toms? A. No, they don't have the reputation of being Uncle Toms.

Q. So far as you know, is that right? A. As far as I know, no.

Q. How many Negroes were struck from the Voters Registration list? A. I don't know.

Q. You did nothing to find out the number you struck? A. I did not.

Q. How many Negroes were struck for over age? A. I do not know.

Q. Do you know of any one on the Jury Commission who would know? [22] A. No, no one on the Jury Commission knows.

Q. Was any investigation made by any of the Jury Commissioners that you know about to determine the number

of Negroes struck at the court house? A. There was no investigation made to my knowledge.

Q. Would the same be true for over age? A. Right.

Q. How many persons were struck as being under 21 years of age that were members of the Negro race? A. I do not know.

Q. How many of the persons struck as being dead were members of the Negro race? A. I do not know.

Q. You made no investigation to determine? A. I did not.

Q. How many of the persons who were struck who were listed on your report as persons who maintained Taliaferro County as a permanent place of residence but who were most of the time away from the county, and how many of them were Negroes? A. I do not know.

Q. Was any investigation made? A. No sir.

Q. How many of the persons who requested to be eliminated from consideration were Negroes? [23] A. One.

Judge Bell: Only one?

The Witness: Yes sir.

Q. How many persons with respect to the persons who requested to be eliminated from consideration—how did you go about determining that? A. Well, the word spreaded that we were revising the jury and people called in and asked me not to put their names on the jury list.

Judge Bell: This was just information that came to you?

The Witness: Yes sir, from various people. They called in and asked not to be put on the jury list.

Q. What method did you use to spread the information that you were revising the jury box? A. We did not use any method. We didn't have time to spread any information. We were just revising the jury and—

Judge Bell: By word of mouth would be the only way?

The Witness: That's right, yes sir.

Judge Bell: Now, you had five members of the Commission?

The Witness: Yes sir.

Judge Bell: And you had three Negro helpers, citizens, as consultants?

The Witness: Yes sir, they helped this one afternoon.

[24] Q. There was no public announcement that you were actually revising the jury list, was there? A. No sir.

Q. Did you consider the fact that you were not making a public announcement a discrete act? A. Did I consider it?

Q. Yes sir? A. No, we did not. We were under the impression that we had a job to do and wanted to do it, and we felt there would not be time to have an announcement due to the fact that it would just be put in the paper on Friday, would come out in the paper Friday, and for that reason we did not make a public announcement.

Judge Bell: Just a minute now. What came out in the paper?

The Witness: I said that it would have come out the following Friday, and we went to work on Mon-

day morning and notice would not have gotten out until Friday.

Judge Bell: Oh. I see.

Q. What was the date that you actually went to work?
A. Monday, January 29th, I believe it was.

Q. When did you complete the revision? A. We completed— Well, we actually didn't get [25] through with it until Tuesday.

Q. What was the date? A. The following Tuesday.

Q. Tuesday, February, what? A. February—well, I have forgotten. I would have to look it up on the calendar. It was the first Tuesday in February.

Q. You worked on how many days revising the jury list? A. We worked five days on revising the jury list.

Q. How many hours a day did you work? A. From 9:00 o'clock until 5:00 or 5:30 or 6:00 o'clock.

Q. You started at 9:00 o'clock in the morning and worked until 5:30 or 6:00 o'clock in the evening? A. Yes sir.

Q. How many days did the Negro revisors assist you?
A. Wednesday afternoon.

Q. Just Wednesday afternoon? A. Yes.

Q. They assisted you only one day? A. One afternoon.

Q. How many hours did they actually spend with the Commission? [26] A. Willie James and John Shorter helped us from 2:00 o'clock until, I believe, it was about 5:30 or 6:00 o'clock, and Margie came in, I believe, around 3:30, and worked until we quit about 5:30 or 6:00 o'clock.

Q. Now, you list 225 persons as being persons about whom information could not be obtained? Could you tell us how many of those persons were Negroes? A. I could not. I don't know.

Q. You don't know? A. No.

Q. Is it possible that all of them could be members of the Negro race? A. I couldn't say how many were Negroes.

Q. You wouldn't know? A. I wouldn't know. I don't have any idea.

Q. Could you tell us how many persons were listed as persons of both the White and Negro race who were rejected by the Jury Commissioners as not conforming to the statutory qualifications for jurors either because of being unintelligent or because they were not upright citizens? A. I would not know.

Q. Did you make any investigation to determine this? A. No, I did not.

[27] Q. Now, what did you mean by unintelligent? A. What did I mean by unintelligent?

Q. Yes sir? A. People who we thought would be capable of interpreting proceedings that would be going on in the court room.

Q. Let me ask the question again. A. All right.

Q. And be sure that you understand it? A. Well, what was your question?

Q. Mr. Griffith, what did you mean by using the word "unintelligent"? A. I thought you meant—

Judge Bell: I understood the answer clearly.

Mr. Moore: I did too, Your Honor, but he misunderstood my question.

The Witness: I misunderstood the question.

Q. Would you like for me to ask it again, Mr. Griffith? I simply asked—

Judge Bell: —Let me ask him. He means in applying the "unintelligent" in the selection of jurors,

what was your standard? What standard did you use?

The Witness: People that could not read nor write to our knowledge. I don't think we rejected anyone because you say they are unintelligent. I mean that—

[28] Judge Bell: You said awhile ago being able to understand proceedings in court.

The Witness: Yes sir, and we made the overall consideration of uprightness and people who were dependent and reliable and honest. We did not say pick out so and so and say they were unintelligent.

Judge Bell: In other words, you measured these people by the standard as to whether or not they were capable of serving on a jury and understand what the duty of a juror was?

The Witness: That's right, sir.

Q. You often use the phrase "upright citizens." Tell us what you mean by that? A. People who have a good reputation in the community, good character.

Q. Anything else? A. I can't think of anything else right now.

Judge Bell: Let me ask him some more questions about this 178. The word "upright" has always bothered me when the Jury Commissioners started making such a test applying the standard of "upright", you say it is good moral character, good reputation. I suppose that is one thing that it means. Did you eliminate anybody in this 178 that had a record as a criminal?

The Witness: Yes sir.

[29] Judge Bell: Some of them were in that category?

The Witness: Yes sir.

Judge Bell: Well, give us an example how you did it?

The Witness: I can give you an outline of what we went by, Judge.

Judge Bell: I wish you would do that?

The Witness: Number one, these are the things that we considered: Has he ever been convicted of a crime? If so, what offense? Was he convicted? Even if not so convicted, did the majority of the Commissioners deem him or her upright? What education has he. Do you consider him sufficiently intelligent to perform the duties of a grand and traverse juror. This number six, we did not consider it.

Judge Bell: What was six?

The Witness: Is it your opinion that he would act impartial in his conduct as a grand or traverse juror?

Judge Bell: You did not use that?

The Witness: No sir, we did not use that because we didn't think that we should judge whether a person would act impartial or not. Knowing the oath which grand jurors and traverse jurors must take under the law is it your opinion that he would abide by that oath in his conduct as a juror?

Judge Bell: You used the last two?

The Witness: Yes sir.

Judge Bell: Whether you thought he would abide by his [30] oath?

The Witness: Yes sir.

Judge Bell: All right.

Q. Mr. Griffith, what investigation did you make to determine whether a given juror had a criminal record? A. The Sheriff gave us that information and the Clerk of the Court. I forgot to mention that the Sheriff helped us and the Clerk of the Court helped us on this and also Mr. Taylor Lyles.

Q. Who is Mr. Taylor Lyles? A. He was acting as our clerk due to the fact that the Clerk, Mr. Golucke, was the Clerk of Court we went in one of the jury rooms upstairs and we asked Mr. Taylor Lyles—he came in, I believe it was on Wednesday, after we had gone through the whole list and he began to help us do the book work.

Q. Is Mr. Taylor Lyles a Negro or a White man? A. He is a White man.

Judge Bell: You say he served as Clerk of the Jury Commissioners?

The Witness: Yes sir.

Judge Bell: How much did the Clerk of the Court, Mr. Galucke, help you?

The Witness: Mr. Galucke came up one afternoon and helped us with the people as to crime and also the Sheriff one afternoon.

[31] *By Mr. Moore:*

Q. The Sheriff only came one afternoon? A. That's right, one afternoon, I believe.

Judge Bell: About how many people, if you know, did you eliminate because of their record, their criminal record?

The Witness: I have no knowledge of that.

Judge Bell: Was it more than one?

The Witness: Yes sir, there were more than one.

Judge Bell: But you don't know how many?

The Witness: No sir.

By Mr. Moore:

Q. You say the Sheriff only helped you one day, is that right? A. That's right.

Q. Was this after you had already gone through the Voters Registration List? A. Yes, it was after we had gone through the Voters List—that's right—in other words, after we had gone through the Voters List and had the people, the ones that we knew about, were put on a card, that is when we asked the Sheriff and other people to help us.

Judge Bell: And then after that you eliminated some?

The Witness: Yes sir. We eliminated some and we asked the three Negroes to help us to eliminate some and the Sheriff and the Clerk of the Court to help us.

[32] *By Mr. Moore:*

Q. For what crime did you eliminate prospective jurors?

A. What crimes?

Q. Yes sir, what types of crimes? A. I don't know definitely. I went by what the Sheriff told us and also the Clerk of the Court. They knew.

Q. Do you know whether any persons were eliminated for mere traffic violations alone? A. I would not know.

Q. You used the word in your testimony as to persons who were dependable. I believe that was the expression you used. What did you mean by that? A. Persons who were dependable?

Q. Yes sir? A. I don't remember using the word "dependable".

Q. When we were asking you about uprightness one of the phrases that you used was "if they were dependable"?

Judge Bell: I didn't hear that. I don't remember that.

The Witness: I may have said it.

Judge Bell: I don't remember him saying that. He may have said it.

The Witness: I think I said people who had a good reputation, people who were honest and of good character. Taliaferro County is not any big county and you know the [33] majority of the people there and the reputation they had.

Q. Did you understand my question about dependable?

Judge Bell: Well, he said he didn't use it. I don't know anything you can do about it, if he didn't use it.

Q. The 32 persons listed on the voters list more than once, how many of those were members of the Negro race? A. I don't know.

Q. Did you make any notation on the cards when you listed the names of the prospective jurors? A. Did I make any notation?

Q. Yes sir, on the cards? A. No sir.

Q. What information did you put on the card? A. We put on the cards the names. We numbered the cards 1, 2, 3, 4, 5 and 6 and so on, numbered them down the line. If that person was accepted number one was "No." Number 2 was unknown. Number 3 was "yes". Number 4, if we knew their education we put what we knew. If we didn't, we put "unknown". Number 5 would be "Yes." Number 6 would be "Yes." And number 7 would be "Yes."

Judge Bell: In giving these numbers you are referring to these questions you called out?

The Witness: Yes sir. And on the ones that were rejected it should have been; number one would have been "unknown." [34] Number 2 would have been "Unknown." Number 3 would have been "No." Number 4 would be "Unknown." Number 5 would be "No." Number 6 would be "No." and number 7 would be "No."

Judge Bell: Do you have a jury card with you, one of these cards you are speaking of?

The Witness: No sir, I don't.

By Mr. Moore:

Q. Now, Mr. Griffith, if the Jury Commissioners could answer those six questions that are on that list that you put in your inside pocket the Jury Commissioners would then know the race of the particular individual being considered, wouldn't they? A. We would know the race of the particular individual being considered but we didn't make a number and say "This number 24 is a Negro we have considered." We didn't do that, no.

Judge Morgan: Did you give consideration to race one way or the other?

The Witness: No sir. We did not. We thought we did a good job.

Judge Scarlett: How long did it take you to do this, a little over a week?

The Witness: Yes sir, a little over a week.

By Mr. Moore:

Q. It is not quite true, in your answer to Judge Morgan, that you did not give consideration to [35] race. The Judge directed you, didn't he, to bring the list in in conformity with the law and you had to consider race, didn't you?

A. Yes, we considered race after we were through, but I am talking about getting the names of people who we thought would be eligible to serve as jurors, and race wasn't considered then.

Q. When you had finished, did you make a decision as to whether you had a cross section of the community? A. We decided how we thought would be the best way to do it which is outlined in the way we did hear it.

Q. You considered the list that you came up with to be a representative cross section of the community?

Judge Bell: That would be a question of law. He might have some idea maybe that he thinks is a fair list, but the Court is going to rule on that as to whether or not it is. The law says it must be a fair cross section of the community.

Mr. Moore: But under the law they are to make that determination.

The Witness: We thought under the law we had to get a fair cross section of upright and intelligent people. There were people used in this thing here

that were more intelligent than others and vice versa. We haven't discriminated against anybody.

[36] Q. How many women are on the jury list? A. I do not know.

Q. What effort did you make to include women on the jury list? A. Their names were on the voters list and we thought they were qualified. In other words, the things we considered on this paper we put them on there.

Judge Bell: Did you take women off because they they were women?

A. No sir, we did not take women off because they were women.

Judge Bell: Did you take any Negro off because he was a Negro?

The Witness: No sir, we did not.

Judge Bell: Did you put any white man on because he was a white man?

The Witness: No sir.

Judge Bell: You don't have any Indians in Taliaferro County, do you?

The Witness: No sir.

Judge Bell: All right.

Q. Now with respect to the categories of persons excluded, listed on Page 4 and Page 5, Defendant's Exhibit No. 2, you cannot tell the Court how many of those persons of each category is a member of the female race? A. No sir.

[37] Judge Bell: Now, there is one thing I would like to do, Mr. Moore, and I know that you have this

information available, and that is I would like to know the percentage of eligible Negroes in Taliaferro County who are registered to vote, and the percentage of white people who are registered to vote! Did you put that in evidence before?

Mr. Moore: Yes sir, that was put in evidence before.

Judge Bell: What is that?

Judge Morgan: About 1100, as I recall.

Mr. Moore: I put in the rock bottom figure, Your Honor. 944 names and then we put in another figure from the Southern Regional Council that gave a total of 1100.

Judge Bell: 1100 is what the Southern Regional Council says. The Census has better information. I prefer to go by their information.

Mr. Moore: The 940 came from the survey that the plaintiffs have done in the county. We also put in the Census Report showing the Democratic characteristic of the County as an exhibit in the form of an affidavit. That's in evidence and is very descriptive and gives the percentages.

Judge Scarlett: Didn't you have the Census?

Mr. Moore: Yes sir.

Judge Bell: How many did they say? What percentage of the Negroes were registered, of the eligible Negroes that were registered? I am coming to the strong conclusion here that there [38] are more people registered to vote in Taliaferro County than they have living there, and the work that these Jury Commissioners have done shows that. A lot of these 514 people don't live there. They just come around there once in a while.

Judge Scarlett: On election day?

Judge Bell: I think so. How many people voted in the last General Election in Taliaferro County? Do you know that, Mr. Turner?

Mr. Turner: About 1300 or 1400 people, if I am correct, somewhere in that category.

Judge Bell: About half white and half Negro?

Mr. Turner: The majority of the registered voters in Taliaferro County are Negro.

Judge Bell: I know that, but I am talking about the number of people who voted. They found 33 people that were registered twice.

Mr. Turner: Judge, Your Honor, as the witness has stated Taliaferro County is a small county and from week to week you will have a chance to see everybody in the county, and the last election day I saw many white people that I had never seen before.

Judge Bell: Well, wait a minute. Let's don't get into that. You be sitting there thinking about the number of folks that voted. We want to get something in evidence about this. This [39] is just like most every voter list in the whole country. There are people on there who are dead and who have moved away. Nobody ever purges a voters' list. I want to find out some way this morning when the last time the voters' list has been purged and so forth and try to explain some of these large groups here, like 514 who don't reside in Taliaferro County permanently, and 225 they couldn't find out anything about, so we need some of this kind of information. We will let you testify a little later on. I am just

trying to raise this point in the courtroom now so people can be thinking about it.

Judge Scarlett: Couldn't we ask some of those people on the front row out there? They are from Taliaferro County and they will know perhaps.

Judge Bell: We will get some of them on the stand in a little bit.

Judge Morgan: Am I correct that at the last hearing there was some testimony to the effect that there were 1100 Negroes registered to vote and approximately a 1000 whites.

Mr. Bloch: In the prior record, a witness, and I think it was the Plaintiff, testified that there are 949 Negroes in Taliaferro County eligible to vote, and Judge Bell says "949." The witness says "949", and Judge Bell asked how many voted in the last election, just out of curiosity" and the witness answered "As far as I was able to determine there were about 100 Negroes who did not vote." That's on Page 131 of the record.

[40] Judge Bell: All right. Now, at that time, Mr. Moore, were we talking about Negroes actually registered?

Mr. Moore: These were actual registered Negro voters.

Judge Scarlett: Do you have the number of white people that voted, Charlie? Do you have a list of the white?

Mr. Bloch: Let me see if I can find that. There is some more on that page. Judge Morgan asked at the bottom of the page.

"You read that against the voters' list, checked that against the voters' list?"

The witness said: "We did the best we could but that was not an adequate way to come up with an adequate figure."

Judge Bell Said: "Because a lot of those folks had left the County?"

The witness said: "Well, I see some people on the voting list in my family who have been dead and buried for ten years."

Judge Bell: What the Jury Commissioners have done shows all of this to be true, that it has not been purged.

Mr. Moore: Your Honor, at that point, what the witness is doing is reconciling the difference between the survey they made and the figures that we put into evidence under the Southern Regional Council Report, and I asked him how does he reconcile that difference, and that was his testimony.

[41] Judge Bell: All right, lets get on with the cross examination of this witness. I raised this question because we do need to get something in the record on it to explain about these people they couldn't locate. What happened to them.

By Mr. Moore:

Q. Now, Mr. Griffith, of the 304 persons on the Traverse Jury List, how many of them are women? A. How many of them are women?

Q. Yes sir? A. I do not know.

Q. And you would not know how many are Negroes? A. No, I would not.

Q. With respect to the 121 names on the Grand Jury List, can you tell the Court how many are women? A. No, I cannot.

Q. And that would be true if I were to ask you how many Negroes were on the Grand Jury list? A. That's right.

Judge Bell: Now, just one second there. Do you have a list of the jurors with you?

The Witness: Yes, I do.

Judge Bell: After you get off the stand, can you sit down and estimate how many women there are on the list? We might just as well get this in the record now?

The Witness: How many Negro women?

[42] Judge Bell: No, just women. Period.

The Witness: On the Grand Jury List?

Judge Bell: The Traverse Jury and the Grand Jury.

The Witness: Yes sir. I will be glad to do it now.

Judge Bell: No, you can do it a little later on, try to estimate how many women are on the list. You don't have to separate them by race.

Mr. Moore: We would like for him to separate them by race.

Judge Bell: No. You don't have any law on earth, as I know of, where you have to have so many Negro women and so many White women on the jury list. It is just women. Period. And that is not a settled constitutional right yet.

Mr. Moore: I agree with that, Your Honor.

Judge Bell: All right.

Judge Scarlett: Did you also get the number of White people on the list that voted in the last election?

The Witness: I do not have the voters' list with me.

Mr. Moore: I would like to be heard a ~~minute~~, Your Honor.

Judge Bell: All right, what is it?

Mr. Moore: The significance of determining the number of Negro women is that the Negro women is the largest identifiable group in the county. Not only are they a sexual group but they are a racial group also.

[43] Judge Bell: You mean there are more Negro women than there are Negro men?

Mr. Moore: Yes sir. I think there are more Negro women in the County than anybody, or any single segment, more Negro women than White men, more Negro women than White women.

Judge Bell: You want to show that they did not take very many out of this one large group? That is the idea of the thing, I guess.

Mr. Moore: Yes sir, and the Democratic characteristics of the county are developed and shown fully in our affidavit.

Judge Bell: Well, if Mr. Griffith knows, if he can look on there and tell, he can give that information. If he says that he doesn't know, he just doesn't know.

Judge Scarlett: Well, what are you interested in, the number of White and Colored women who are registered, or just the Colored women?

Mr. Moore: We would like to know both, Your Honor.

Judge Scarlett: All right.

Mr. Bloch: Your Honor, the complaint alleges in paragraph 13, 14 and 16—I don't know whether this

goes directly to Judge Scarlett's question or not—but here are the allegations in paragraph 13: "There are 2097 Negro residents in Taliaferro County, Georgia, of whom 979 are over the age of 21, including 435 males and 544 females.

[44] Paragraph Fourteen: "There are 1273 White persons resident in Taliaferro County, of whom 877 are over the age of 21, including 395 males and 482 females."

Then there are 1172 members of the Negro race enrolled as registered voters in Taliaferro County, and hence eligible for service on both the grand jury and traverse jury of said county."

That is the allegation and Judge Bell called attention to the fact, to the questioning when Mr. Owens objected to the witness' statement that there weren't but 949—and then what did he want to object for, that it was in his favor. There was 949 in proof and 1172 in the allegation and—

Judge Bell: —Lost over 200.

Mr. Bloch: Sir?

Judge Bell: Lost over 200. You alleged that you had 1172 registered Negro voters and your proof was that you had 949, so you lost over 200.

Mr. Moore: Judge, we were anxious to prove two things. Actually, there were 940 and we had evidence to back that up, and we had SRC figures, and we were trying to reconcile them and present a true picture.

Judge Scarlett: In the petition—Judge Bell just said that.

Mr. Moore: We were able to prove those figures.

[45] Judge Bell: No. Something has happened now. There are some missing people, and that is what we are trying to find out about now.

Mr. Moore: Your Honor, if the Court accepts the SRC, we have proved it.

Judge Bell: We are not going to accept SRC figures.

Mr. Moore: We put in evidence—

Judge Bell: —You know we are not going to accept some private figure. We have got to go by the Census and sworn testimony.

Mr. Moore: Then we put in sworn testimony of what the actual figures are.

Judge Bell: You see, we don't know, I don't guess we know, how many White voters there are supposed to be in Taliaferro County because nobody has testified about that, as I know of. There are probably two or three hundred missing on that, I imagine.

Mr. Moore: Your Honor, we put in the SRC figures also to show the White people, all of them. The significance of the figures, Your Honor, are that the figures show that both groups, Negro and White, are registered in excess of 100 percent, but we do have some figures at the end from which some judgment could be made. Now, this was the very best that we could do.

Judge Bell: Now, what do the SRC figures show as compared to Mr. Turner's testimony that there are 949 Negroes. Let's test the figures right now.

[46] Mr. Moore: Just one second.

Judge Scarlett: What connection has the Census with this SRC?

Mr. Moore: It shows the number of people in the county over the age—

Judge Bell: —That could register, if they wanted to.

Judge Scarlett: I see.

Judge Bell: I might say that this is not any peculiarity of Taliaferro County—this is true in many counties all over the country, there are more people registered than live there. People move away from a place and they keep registered there, and they go on to Atlanta or somewhere and they register there too. It doesn't mean that they vote in both places.

Mr. Moore: Your Honor, according to the SRC figures in Taliaferro County as of the summer of 1966, there were White voting age population of 917, Negro voting age population 1173. White registered 1052. The figure you asked for, Mr. Bloch, Negro voting age population 1073. Negro registered 1165. Per cent White registered 100 plus, per cent Negro registered 100 plus. These are the figures as of September 1966 which comes from various sources.

Judge Bell: The hundred percent White race, what?

Mr. Moore: Over one hundred percent.

Judge Bell: What?

Mr. Moore: Over one hundred per cent.

[47] Judge Bell: On the White race?

Mr. Moore: One hundred per cent, plus.

Judge Bell: Now, that document there says there were 1165 Negroes registered to vote in Taliaferro County.

Mr. Moore: Yes sir.

Judge Bell: Mr. Turner testified that as near as he could find there were 949.

Mr. Moore: Yes sir.

Judge Bell: We didn't have any testimony about how many Whites could be found, did we?

Mr. Moore: Yes sir.

Judge Bell: All right, the significance of these figures is that they tie in very closely with the fact that these jury commissioners could not locate 225 people and they found 514 who were away from the county the most of the time.

Mr. Moore: Yes sir.

Judge Bell: I don't know how that would break between White and Negro. It ties in very closely though.

Mr. Moore: Your Honor, Mr. Turner testified that he went from door to door and made a survey and actually had a physical contact with people they put in their files as people registered to vote, which I submit is a reliable way to do it.

Judge Bell: All right.

Mr. Bloch: Your Honor, I think counsel covered what [48] I was going to call attention to. The 16th paragraph of the complaint says there are 1053 White persons enrolled as registered voters in Taliaferro County, Georgia, and hence eligible for service on the Grand and Traverse Juries in said county.

Now, Your Honors, I call attention to something that is perfectly apparent to me with respect to both of these paragraphs, most of the number of the Negro race enrolled and the White race en-

rolled they wind up with the sentence "and hence eligible for service on the Grand and Traverse Juries of said county."

We shall urge at the proper time that the mere fact they are on the jury list—of the registered voters' list—doesn't make them eligible to vote unless in the opinion of the Jury Commissioners they conform to the law and—

Judge Bell: —I think we can construe that allegation that they are eligible to be considered for jury service.

Mr. Moore: Your Honor, I think that this type of confusion and the difficulty of really nailing it to the wall as a matter of proof demonstrates the inadequacy of the voters registration list.

Judge Bell: Well, it just happens that I have seen a good many jury lists and these Jury Commissioners have gone about this in about an efficient way, according to what he has testified, as any I have seen. It is a far better system than, [49] say, the key man system the federal courts use in many places, except in the Fifth Circuit. You are aware of the key man system being used everywhere else except the Fifth Circuit, where one man can go out and select who he wants to be on the jury. Now, these people took the voters list, and assuming that they did not take anybody off the regular list—on proof of that—they ended up with 608 names and they said "we will take every other name", and it resulted in 113 Negroes and 191 Whites. If you had a perfect jury list and you said we are going to evade the laws of the United States and do it by race. Period. Going to have the same per-

centage, how would you come out? It would be half and half, I guess.

Mr. Moore: The Negroes would be in the majority on the jury list.

Judge Bell: Well, I don't know that, whether they would be in the majority or not. We wouldn't know that until we could find out how many of these missing people were Negroes and how many were Whites. They would be somewhere near even, I will say that.

Judge Scarlett: Well, don't you all think you are overlooking one fact, and that is maybe a lot of these white ladies did not want to go to the polls, scared to go down there, maybe. Now, that could have something to do with those 200 people who didn't vote.

Judge Bell: They can't find them.

[50] Judge Scarlett: Can't find them?

Judge Bell: No.

The Witness: Judge, the information you asked me to look up—

Judge Bell: —Yes, that's about the females?

The Witness: Yes sir.

Judge Bell: He is going to tell us about the females. All right.

The Witness: There are 149 women on the Traverse Jury, and there are 37 women on the Grand Jury.

Judge Bell: 149 women on the Traverse Jury?

The Witness: Yes sir, and 37 on the Grand Jury.

Judge Bell: 37 women on the Grand Jury. That is 37 out of a total of 111 people.

Mr. Moore: 121.

Judge Bell: 121. And 37 of them are women. All right, now Mr. Moore asked you how many of those were Negro women.

The Witness: Do you want me to check that.

Judge Bell: Look at the names and make the best estimate you can.

The Witness: Of the Grand Jury?

Mr. Moore: I think the list should go into evidence.

Judge Bell: How is that?

Mr. Moore: I think the list should go into evidence since we put the prior jury list in evidence.

[51] Judge Bell: Well, he will be glad to put that in, I imagine.

Mr. Bloch: Yes sir, we will put it in evidence.

Judge Bell: There is no problem about that.

Mr. Bloch: Do you want a copy of that put into evidence?

Judge Bell: Yes sir.

Mr. Bloch: Yes sir, certainly, we will put it in.

Judge Bell: All right, anything else for this witness?

Mr. Moore: I want to ask him a couple more questions.

Judge Bell: Well, I was going to let him get off the stand and set down somewhere and figure up how many of the women, or Negro women, from his best estimate are on the list. There is no use taking up time having him do that on the stand. Finish up with him so he can go down and do that and then he can come back and testify to that.

By Mr. Moore:

Q. Can you tell the Court what economical bracket these 304 jurors are in? A. What economical bracket?

Q. Yes? A. I would say all kind.

Q. Are they all property owners? A. I do not know.

Judge Bell: He is asking this question, Mr. Griffith, as if you were in Pittsburgh, Pennsylvania, or somewhere where [52] they have got a lot of blue collar workers.

The Witness: We have one or two blue collar workers. There are farmers on here, preachers on here, maids, and insurance men and people who don't do nothing.

Judge Bell: All walks of life?

The Witness: All walks of life.

Judge Bell: Do you have any strong labor movement in Taliaferro County?

The Witness: No sir, we do not.

Judge Bell: Do you have any Unions at all that you know of?

The Witness: No sir, not that I know of.

Judge Bell: So, you wouldn't need to know about that, Mr. Moore, about whether they have got anybody from the Labor Unions or not.

Q. Let me ask you this: Do you know how many of these people are property owners? A. No, I do not.

Q. Did you make an investigation to determine that?
A. No, I did not.

Judge Morgan: Did you attempt to use whether or not they were property owners in making up your list? Did you give that any consideration?

The Witness: No sir.

[53] Judge Bell: All right, you may go down.

The Witness: Do you want me to figure this out?

Judge Bell: Yes, figure out how many of the women are Negro women, if you can. Go out there and sit down somewhere and do that for us. Just an estimate.

Mr. Bloch: Call Judge Stephens.

Mr. Moore: If you are going to call other non-party witnesses, they should be excluded from the court room.

Mr. Bloch: Judge Stephens is Judge of the Superior Court, Your Honor.

Judge Bell: You haven't asked for the rule, Mr. Moore.

Mr. Moore: I never ask for the rule against a Judge, but I am saying that if there are other non-party witnesses then I will expect them to be excluded from the court room.

Mr. Bloch: Mrs. Williams, she may have to go on the stand.

Judge Bell: Somebody has got to tell about selecting these two Members of the Board of Education.

Mr. Bloch: I didn't know, Your Honor, that we were going to get into such technicalities, but we have here certified copies, or rather the original and copies of the Minutes of the Board of Education that shows the selection of the two members.

Judge Bell: And do you have a Resolution of some sort or some sort of a certified copy of the Minutes of the Grand Jury?

Mr. Bloch: No sir, I do not. That was what I was coming [54] to, and I was going to ask permission—it has just occurred to me since we started into this that the highest and best evidence of the action of the Grand Jury would be a certified copy of its report to the court, or filed with the court, if there is one. I can't say whether there is or not, but I ask permission to file a certified copy of the report of the Grand Jury—

Judge Stephens: If you will pardon me. You mean the presentments that the Grand Jury makes?

Judge Bell: Yes sir?

Judge Stephens: Yes sir, they are. Of course, reduced to writing, presented in open court, and are put upon the Minutes of the Court and subsequently, generally speaking, they are published. I order that they be published in the local paper which will be done, if it hasn't already been done.

Judge Bell: The Court will grant you leave to file a certified copy of the presentments that reflects the election of some of the school board, members of the school board, these two mentioned in this report.

Mr. Bloch: Within ten days?

Judge Bell: Within ten days will be all right.

Judge Scarlett: Well, do you have any official notice of the election of these two members of the Board of Education? I mean the Judge.

Judge Stephens: No sir. The only way it would reach [55] me, Judge—

Judge Scarlett: —Would be from the presentments?

Judge Stephens: Yes sir.

Judge Scarlett: And then do you swear those Members of the Board of Education into office?

Judge Stephens: No sir. I am not sure of that formality, but the School Board would in some way take care of that.

Judge Scarlett: Well, that's all right. I just wanted to find out how it was handled.

Mr. Bloch: That is not what I was going to prove by the Judge. I was going to prove by Judge Stephens—

Judge Bell: —About drawing the Grand Jury?

Mr. Bloch: No sir. It was paragraph on Page 5 beginning after the "new traverse list"—

Judge Bell: —Now, wait just a minute. If you put these presentments in, if you send that in later, Judge Stephens is going to testify, but you need somebody to testify about the electing of these two men, the selection by the Board of Education. Is that going to be Mrs. Williams or somebody in the Board of Education?

Mr. Bloch: It may be Mrs. Williams or Mrs. Fambrough, the Chairman, or it may be the Minutes. We have them all here.

Judge Bell: Well, Mr. Moore has asked for the rule. Of course we could rule that he can't get the rule at this time [56] because he didn't ask for it in the beginning.

Judge Scarlett: Wasn't he—

Mr. Bloch: —There are—

Judge Scarlett: —Just one minute, Mr. Bloch. Wasn't he required, under the order that we perfected that he was to serve opposing counsel a certain number of days before the hearing of any witnesses or evidence that he was going to produce?

Mr. Bloch: What was said was this—

Judge Bell: —Each side was suppose to do that.

Mr. Bloch: Page 211 of the record Mr. Moore said: "I would like for all parties to be required to notify each other within, say, five days of the hearing if they are going to put on evidence."

Some week or ten days ago we notified Mr. Moore by letter that we would put up some or all of the Board of Education and Jury Commissioners, and I think that complies with it.

Judge Scarlett: Well, did you get anything from him about that?

Mr. Bloch: No sir, I got nothing from him.

Judge Bell: Mr. Moore is not trying to put on any evidence.

Judge Scarlett: He is getting ready to.

Judge Bell: No, he has asked for the rule to put these witnesses out of the court room. That is all he is talking [57] about now.

Judge Scarlett: Well, I have had that up every-time.

Judge Bell: Well, do you insist on that?

Mr. Moore: No sir.

Judge Bell: All right, then that ends that.

Mr. Bloch: Take the stand Judge Stephens.

Mr. Moore: I don't insist on the Judge testifying.

Judge Bell: Well, that's all right about that. Let somebody administer the oath to you, Judge Stephens. Mr. Moore said that he doesn't insist on you testifying, but I want to ask you a question.

Judge Stephens: All right, sir.

JUDGE R. L. STEPHENS, After having been first duly sworn the truth, the whole truth and nothing but the truth to tell, testified as follows:

By Judge Bell: I want to get it in the record here how you select the Grand Jury, a traverse jury and a grand jury in the superior court. Now, understand in this case all that we are concerned with is the grand jury, the new grand jury that was chosen. We would like for you to tell us how you do both of them. We would like to know whether it is in boxes and whether it is open in the court room and who was present when you draw the jury and that sort of thing. Suppose you examine [58] him along that line Mr. Bloch.

Mr. Bloch: That's a good question.

Direct Examination by Mr. Bloch:

Q. You are Judge Robert L. Stephens? A. Yes sir.

Q. Your residence is in Thomson? A. Yes sir.

Q. In McDuffie County? A. Yes sir.

Q. You are a superior court Judge in Georgia? A. Yes sir.

Q. Elected by the people? A. Yes sir.

Q. What Circuit is that? A. Toombs Circuit.

Q. Consisting of what counties? A. Taliaferro, Warren, Glascock, Wilkes, Lincoln and McDuffie.

Q. In each of those counties are you charged with the duty under the law of drawing a grand jury and trial jury in each of the counties? [59] A. Yes sir, I am.

Q. In your own language, would you state to the Court what the procedure is in each of those counties in drawing the traverse juries and the grand juries? A. Yes sir. In each of the counties it is basically the same. Of course, by operation of law one term of the court, as you would know, last until five days immediately before the next term of court, therefore when I open the court on the first day of the term in each of these counties I keep it open until five days before the convening of the next court.

All right, now, with particular reference to the grand jury here mentioned, I went to Taliaferro County. The term of court was still in existence. I had the Clerk of the Court to bring the jury box upstairs. The Sheriff was present. Of course, the Clerk was ever present and listing the names as I drew them. The master key is under my hand and seal. This envelope, I tear it open. First, before I commence any procedure in any wise, that is, drawing the jury or otherwise, I have the court opened. When the court is officially opened I go into the jury box, and as you gentlemen certainly must know, it is like drawing, if you please, from a lottery. You draw from box number one and put the name called into box number two until you have a sufficient number of jurors.

Judge Bell: Now, is there a separate box for grand jurors?

[60] The Witness: Yes sir.

Judge Bell: You take two fifths of the traverse jury list and put those names in a separate box?

The Witness: Yes sir.

Judge Bell: In other words, you have two boxes?

The Witness: Yes sir.

Judge Bell: One for the grand jurors and one for the traverse jurors?

The Witness: Yes sir. That's correct. But that is done by the Board of Jury Commissioners, together with their clerk. That is, in composing these boxes.

Judge Bell: I mean by that, just physically, when you get there in the court room—

The Witness: —Separate boxes altogether.

Judge Bell: All right, sir.

The Witness: Yes sir.

Judge Bell: Now, tell us about drawing this particular grand jury. You say you were in the court room?

The Witness: Yes sir.

Judge Bell: You call the names out yourself?

The Witness: Yes sir. That is exactly what occurred.

Judge Bell: But you call the names out of the box yourself?

The Witness: Yes sir, always without exception.

Judge Bell: And in this case that was done?

[61] The Witness: It was done exactly in that order, yes sir. After court was duly opened on the occasion, in fact, it was already in session by virtue of not having been adjourned.

Judge Bell: Now, you drew 32 names of Grand Jurors to serve on this Grand Jury that we are concerned with, and nine of those were Negro and 23 were White. Now, who cut it down to 23? Can the Grand Jury be more than 23?

The Witness: No sir. Now, the law provides that we can draw a maximum of 35 names, but that the Grand Jury shall at no time be composed of more than 23, nor less than 16. It was changed last year from 18 to 16 as a minimum, and of course it was so constituted at all times.

Judge Bell: Now, who was in charge of eliminating these extra jurors?

The Witness: What happens, if anyone is over age, or has a legal excuse, if he is excused that list still remains numerically the same, and if one has been excused, of course, his name is not called, but numerically they are taken—the next number that follows until you get that sufficiency. Now, any remaining, of course, they would be subject to call if there would be an insufficiency to serve of those who preceded on the list.

Judge Bell: Well, suppose you had more than you needed?

The Witness: Then they would not be called to serve [62] at that given time, but in the future and during the term if for any reason I had to have more I might call them back and have them sworn accordingly.

Judge Bell: Well, hypothetically, suppose you had five more grand jurors than you needed would you take the last five drawn and eliminate them?

The Witness: Yes sir.

Judge Bell: That's the way you would do it?

The Witness: That's right.

Judge Bell: There wouldn't be any discretion in it?

The Witness: Well, I don't know of any provision of law that would not permit me to exercise a discretion in getting those that were drawn but I don't do it. I start at the top and take them down until I get the maximum number.

Judge Bell: Then those that you don't need you just leave them off the bottom?

The Witness: That's right.

Judge Scarlett: Well, now, if we have more on the Grand Jury in our court than we need we transfer them to the petty jury.

The Witness: Yes sir.

Judge Morgan: If they consent.

Judge Bell: Now, if some one wanted to be excused, do they clear that with the Clerk of the Court?

[63] The Witness: Well, to be perfectly frank, Judge, in the state courts, in our Circuit, that is one of the biggest things that we have to undergo.

Judge Bell: Those who don't want to serve?

The Witness: Who don't want to serve, or for other reasons want to get off. Frequently, as to the traverse jurors, we have to draw a great number because we sometimes can anticipate this sort of thing.

Judge Bell: All right.

The Witness: But even so with the traverse jury list we take them one right on through and their names remain in that order except those who have been excused.

Judge Bell: Now, you drew 32 names here, 9 Negroes and 23 Whites, and in the final outcome only 23 served and after it had been reduced it was

17 Whites and six Negroes, how did that come about? Do you know?

The Witness: Not really unless some were in the excess number and not needed at the end of the list. Now, that might have occurred, but to be perfectly frank that must be correct, but I was of the opinion that more served than that, but that must be correct. I am sure you have checked these figures out.

Mr. Bloch: There couldn't but 23 serve.

The Witness: Oh, I understand that. Frankly, I believe there were seven Negroes. I could be wrong in that. I somehow believe there were seven but I could be mistaken about that. I [64] could be mistaken about that.

Mr. Bloch: We checked on that.

The Witness: Yes sir.

Judge Bell: Now, who would know that?

The Witness: Now, as I drew these names, I would not know whether they were Negro or White.

Mr. Bloch: Wouldn't anybody know about that.

Judge Bell: I know, but I was wondering how you got it cut down to 23. The complaint that the plaintiffs have is that there is so much discretion in the system that it is very easy for somebody along the line to say "lets whack out some Negroes here."

The Witness: No sir.

Judge Bell: I just wanted to find out how that works.

The Witness: No sir, that is not done. If they are drawn, if they are on that list they are expected to serve just as the next man.

Judge Scarlett: Don't you, under the law, have a maximum of 23 jurors?

The Witness: A maximum of 23 and a minimum of 16.

Judge Scarlett: That was what I was trying to get at.

The Witness: Yes sir.

Judge Bell: You think there were seven Negroes and not six on there?

The Witness: I am pretty confident of that, Judge.

[65] Judge Bell: All right.

Mr. Bloch: You will notice that when it was cut from 32 to 23, at the time it was 32, the proportion was 23 and nine. And if it was cut to 23 then the proportion was 17 and six, as stated in the report.

Judge Bell: Yes, but you are not suppose to go by proportions. You are suppose to let the chips fall where they may.

Mr. Bloch: Then what you want to know is how it got cut from 32 to 23?

Judge Bell: I want to know how the chips fall.

The Witness: We just didn't reach that number, if you please.

Mr. Bloch: You excused the others.

Judge Scarlett: It would be 23 and seven that you have now, don't you?

Judge Bell: They had 32 to begin with and they end up with 23.

Mr. Bloch: Who excused them from 32 that brought it down to 23?

Judge Morgan: I assume the Judge did.

The Witness: I would do that. Now, bear in mind this, if you please, if somebody was sick that would have to be passed to me by somebody.

[66] Judge Bell: By the Clerk of the Court?

The Witness: Yes sir, he would be advised of it, generally, and quite frequently, even so, I don't remember in particularly with reference to this particular grand jury, but I have doctors' certificates about somebody, or some written matter telling me of their excuse, and sometimes they will telephone and sometimes they will write me, and as I say it is really one of the biggest nuisances that I have.

Mr. Bloch: Is anybody permitted to excuse grand jurors that have been drawn by you?

The Witness: No sir.

Mr. Bloch: Except you?

The Witness: No sir.

Judge Bell: All right, I think that covers that point.

The Witness: Now, if anybody tells anyone—let me clarify that. As an example, if one of the officers serving a juror, if that juror gives the officer an excuse, or if he passes an excuse to the Clerk then I pass on it later whether he will or will not be excused.

Mr. Bloch: You have the final say on that?

The Witness: Oh, yes, I keep a master list each time I draw them. I have a copy submitted to me and I check my list, and I am very definite, certain and positive about who is on that list and who has been excused.

Judge Bell: All right. But you would not have any [67] way of knowing who was a Negro or who was White?

The Witness: Oh, no sir.

Judge Bell: All right.

The Witness: Now, I possibly would have more knowledge in my home county, but up there I would have no way on earth of knowing about that.

Judge Bell: All right.

Cross Examination by Mr. Moore:

Q. Judge Stephens, are you familiar with the Report that has been prepared by counsel for the defendants?

A. I was familiar with it as it was commenced to be read here. Mr. Watson, back there, I believe had one at the moment and I looked at it as it was read.

Q. Do you know when they began the revision about which you testified? A. It was immediately after the 23rd of January. I attended that first trial down here, so that, to be perfectly frank, know what possibly I might have to do in the matter of complying with whatever was specified.

Q. When did you draw the grand jury that actually appeared? [68] A. I believe it was eight days before the 16th because I was quite concerned. I was involved in other places and I only had that length of time in which the Sheriff would have to serve those required to appear as grand jurors, and there were many other things also to be considered by this grand jury. I had one coming up ordinarily on the 26th but I had to have a special term on the 16th, seeking at that special term to do everything that we would on the 26th. Frankly, trusting, hoping and praying that we could comply, in truth, with all the laws and then not have to come back on the 26th and create that expense for Taliaferro County to have to pay. It was

really a rushed type proposition within eight days. I do remember the eight day situation.

Q. And this was a special revision of the Grand and Traverse Jury in Taliaferro County? A. Oh, yes, it would not have been due at this time. It would not have been due at this time, I believe the next revision—I will have to check the records—would either be in August or August of next year. I am not sure.

Judge Morgan: Every two years?

The Witness: Every two years. And now possibly each year, unless the Judge orders every two years.

Judge Bell: What about that, Mr. Moore? Do you know anything about that?

Mr. Moore: Every two years, and then by special order [69] every three years.

The Witness: It has been changed, although we can do it as often as need be, frankly.

Judge Bell: All right.

Q. Do you anticipate a revision in August of 1968? A. To be perfectly frank, the last, or rather the 30th of March of last year the Legislature enacted this law, and it was signed on the 30th of March, last year, and if there of necessity to be a revision in all of these counties I had it done. If one was recently, if I could avoid it, I think I would have avoided it because I think it would be a repetitious and needless thing to be done this year. Now, if I run out of names it possibly might be different.

Judge Bell: Let me ask a question here. This is something else. You promulgated this order of January 26th requiring this revision?

The Witness: Yes sir.

Judge Bell: And it is your testimony that you did that in pursuant to the fact that this court had ordered—

The Witness: —an oral pronouncement, I would say.

Judge Bell: On the grounds that the jury list in Taliaferro County was—I think we call it mal-constituted?

The Witness: Yes sir.

Judge Bell: The same thing as systematic exclusion?

[70] The Witness: Yes sir.

Judge Bell: That we were talking about, based on race.

The Witness: Yes sir.

Q. Judge Stephens, did you give the Jury Commissioners any instructions as to how they were to proceed to correct the mal-constitution of the grand jury? A. No. I don't know that I gave them any specific instructions except under the law. I met with them following March of last year, and I believe then I took a copy of the Act that had just been signed and sent to me by the Secretary of State so that they would be sure then of the new laws and what should take place. Of course, I explained to them, if you please, the necessity and urgency of a revision at this time because of the oral pronouncement of the Court.

Q. Let me ask you this: Did you give special instructions on January 26th, 1968, about how they should go about revising the jury list? A. No special instructions. no.

Q. Did you read to them anything other than the Georgia Law? A. I didn't read the law, no, but I—

Judge Bell: Well, the order has got special instructions in it?

The Witness: Yes sir.

Judge Bell: The order promulgates it.

[71] The Witness: Yes sir.

Q. There were no instructions beyond what was contained in the special order? A. No sir, except that we had to comply—well, as I say, comply with the oral pronouncement of the court relative to re-composition and revision.

Q. Is it more probable than not that you will revise the jury list in August of 1968? A. I would have to check here and I would have to see the number of names and how many I would draw at each term and see if I would have a sufficiency to carry me passed that point. I just don't know at the present time.

Q. There are 171. A. A 171 names on the Grand Jury?

Q. 121 Grand Jurors? A. 121 Grand Jurors, let me see now. Then 32—I wouldn't just right off hand, see the necessity. No, I would not because I will have another Grand Jury—lets see—in November. It's May, November and February. It's twice that we have a Grand Jury up there, I think. Anyway, I would have to look at my schedule.

Q. You do not anticipate drawing another Grand Jury before 1969? A. Oh, yes. I will. Lets see, I believe it would [72] be in August.

Q. Pardon me. I meant revising the jury list.

Judge Bell: Revising the jury list.

The Witness: At this time, I don't see it, no. Now, also, I could not anticipate the business of the court for the future of drawing of a traverse jury,

you see, either. If we need them, I will draw them. If we don't I won't. If we have to revise, I will, but at this moment I see no need for a revision in August.

Q. Now, Judge Bell asked a question that the Court was extremely concerned about, and I would like to iterate that question because I do not feel that the answer is clear and satisfactory, and that is how did you get down from 32 to 23 Grand Jurors? A. We draw a certain number of names, whichever I determine should be drawn, from the jury box, as you draw a lottery. As the name is drawn, it is put down as number 1, 2, 3, 4, 5, 6 and right on through—I believe this number is 32. All right, I take that list and if any given number is excused, then that of course means in effect the names below are moved up 1. If another one is excused all are moved up in their first order, that is, in the order in which they were drawn until I get that 23. Now, if there are remaining names on the list they, in effect, are not used. Now, if for any reason, and frankly it has never happened to my knowledge, but if—

[73] Judge Morgan: In other words, you call the first 23 in the box who have not been excused?

The Witness: Correct. Exactly, sir. And those that might remain at the bottom of the list are not used but if there would be any matter in which there would be a given number to disqualify of the maximum number of 23 and I needed more to take their places because of disqualifications, I would then possibly use those—what would you say—overage?

Judge Bell: In the federal system they are alternate jurors.

The Witness: Yes sir, in effect.

Q. Let me ask you this Judge: How many Grand Jurors did you excuse following the revision in January '68, this year? A. How many did I excuse?

Q. Yes sir? A. I couldn't remember that. We had a maximum of 23, and it seems to me like there were three maybe, three who were there that we didn't use—that would be 26—we must have used—there must have been about maybe six. Could be six, maybe five, I am not sure.

Q. That were excused? A. In effect, yes. Not used, lets say.

Q. The Grand Jurors that were actually drawn were moved up from a pool of 26 by including about three alternates? A. Yes.

Judge Bell: Now, let me ask you another question: Is [74] any public record made of this list of 32 and what happened to them finally?

The Witness: Yes, you see—

Judge Bell: —You see, this could get to be a variation. We have case after case about this, so we might as well get it settled.

The Witness: Well, I am just confident that the Clerk—you see, I have what they call the master list, or maybe his record is the official list; but he marks his list from mine, and to be perfectly frank I would be surprised and amazed if he didn't keep that original list because we refer back to it so often to see—

Judge Bell: —It is important because some Negro citizen might want to walk into some public office and say: "We are suspicious that somebody has eliminated the Negroes from the Grand Jury. I want to see the list."

The Witness: I am just positive almost as I sit here that that list is preserved in every county.

Mr. Bloch: Would you like for us to file, as a part of the record, anything that we can find with respect to that from the Clerk's records?

The Witness: You will find it exactly like I said, I am sure.

Mr. Moore: Judge Bell is trying to determine whether or not the list of grand jurors is published in the county paper.

[75] Judge Bell: No, but I understand that is usually done.

The Witness: Yes sir. That is a courtesy, more than anything else, but you know I doubt that it might have been done in this special instance because of the lack of time.

Judge Bell: What I really want to know is—I have practiced law and I have seen this many times, they hand you a list of jurors and it is my impression that list is on the Minutes somewhere in the state courts and in the federal courts, but I don't know about this 32 list. If John Doe is excused then somebody ought to write on there "excused."

Judge Morgan: The Sheriff would have to subpoena him though.

Judge Scarlett: You use that in striking the jury.

The Witness: I am very confident if you want that list or if anybody wants it, you can get it.

Judge: Well, Mr. Bloch says he will get it. But I want to get the system down, because one of the complaints the plaintiff has is the system. Now, we are making some progress here, but I want to be certain that there is not some sort of a gap left.

Mr. Bloch: Whatever is there, will be presented.

Judge Bell: All right.

Mr. Moore: What Judge Bell is after: Is the list open to the public in the office of the Clerk of the Superior Court?

The Witness: Very definite. Every record there is open. [76] If not, let me know it, and I will see that it is open.

By Mr. Moore:

Q. And does that include the 32 grand jurors drawn to serve for a particular term of court? A. Why, of course, it would be.

Q. Would that list of grand jurors show the ones that had been excused? A. It would, but possibly not the reasons. The reasons probably would not be written by it.

Q. This would be public information? A. Oh, yes, just like any other record in the Clerk's office would be.

Judge Bell: And that list would be in the order in which those names were drawn?

The Witness: That's true.

Judge Bell: In other words, when you pull out John Doe—

The Witness: Right.

Judge Bell: The Clerk writes down John Doe as Number one?

The Witness: Correct.

Judge Bell: And on down the list?

The Witness: Yes sir.

Judge Scarlett: And you call them out?

The Witness: Yes sir, numerically, one, two, three and right on down the line.

[77] Mr. Bloch: Are your Honors through?
Judge Bell: Yes.

Redirect Examination by Mr. Bloch:

Q. Therefore, as I understand it, when they are drawn out of the box there is a list of 32 names made, is that right? A. Yes sir.

Q. In the order in which they were drawn? A. Yes sir.

Q. Then that list of 32 were turned over to the clerk? A. Yes, sir. Well, he makes that list as I call them out. He numbers down to however many I call. We will say maybe we will draw 32 and then draw 35 to be sure we have enough to get the qualified number of jurors.

Judge Morgan: And then subpoenas are issued for them and they are turned over to the sheriff?

The Witness: That's right.

Q. That is the list that he uses for the basis of his subpoenas? A. Yes sir.

[78] Q. And then the requests for excuses start coming in? A. Yes sir.

Q. And the 32 is reduced to 23. And what we want is that list of 32, showing the nine who were stricken, and if possible why? A. Well, the list would not show the excuses.

Judge Bell: We don't need to know why.

Mr. Bloch: You don't want to know why?

Judge Bell: No.

Judge Scarlett: That wouldn't be shown no way, would it?

The Witness: No sir. That probably would be on the list that I had but not on the clerk's list.

Judge Bell: Well, what the Court wants to know is an answer to this question, because in some manner a Negro grand juror, otherwise drawn is served, is eliminated out of turn, see. That is really what we want to know about. Have you got that?

The Witness: Well, Judge, may it please the Court—

Judge Bell: —You think that did not happen?

The Witness: I am certain that it did not happen and has never happened.

Judge Bell: Well, get the list and see what it does show.

[79] The Witness: All right, sir.

Judge Bell: All right.

The Witness: Is that all for me?

Judge Bell: Yes sir. Thank you, Judge.

Mr. Bloch: Is Mr. Griffith ready to come back to the stand?

Judge Bell: Yes, put him back on the stand.

Mr. Bloch: Come back to the stand, Mr. Griffith.

[80] C. A. GRIFFITH, Recalled for further examination, testified as follows:

Judge Bell: You were going to tell us about how many Negro women were on the list.

The Witness: To the best of my knowledge, Your Honor, there are 23 Negro women on the Grand Jury, and 70 Negro Women on the Traverse Jury.

Judge Bell: Twenty three Negro women on the Grand Jury?

The Witness: Yes sir.

Judge Bell: That's out of 37 women. How many—seventy?

The Witness: Seventy on the Traverse Jury, yes sir.

Judge Bell: Out of a 149?

The Witness: Yes sir.

Judge Bell: All right.

Judge Scarlett: Any other questions?

Judge Bell: You heard his testimony, didn't you?

Mr. Moore: Yes sir.

Judge Bell: Now, let me ask you a question. This is the way of an estimate, to the best of your knowledge and belief?

The Witness: Yes sir.

Judge Bell: You don't actually know?

The Witness: I don't actually know, no sir.

Judge Bell: All right.

Mr. Moore: I want to ask him a question or two.

[81] *Recross Examination by Mr. Moore:*

Q. Mr. Griffith, did you receive any instructions from Mr. Bloch as to how to draw up the Grand Jury?

Judge Bell: Well, wouldn't that be confidential relationship between attorney and client? They may not claim the privilege.

Mr. Bloch: I don't claim it privileged, and I state in my place that the answer is "yes."

Judge Bell: All right.

Q. Do you have a copy of the instructions that Mr. Bloch gave you? A. Do I have a copy of the instructions?

Q. Yes sir? A. No, I do not.

Mr. Bloch: You have that card we prepared.

Q. But you don't have a copy of the instructions that Mr. Bloch gave you? A. Mr. Bloch gave us this in considering the qualifications of the jurors.

Q. Did he give you any oral instructions or any directions that you don't have on the card there? A. Yes, he did.

[82] Q. Was that pertaining to the grand jury? A. We thought that this way would be the best way of drawing the grand jury. We asked him by 'phone, and he said that he thought that would be a fine way to do it.

Q. Did he tell you the number of Negroes to put on there? A. No, he did not.

Q. Did he give you any instructions at all with respect to how you should go about including Negroes on the grand jury? A. No, he did not.

Q. No mention of that? A. What? What was your question?

Q. He made no mention about including Negroes on the grand jury? A. Yes. We knew that we were going to include Negroes on the grand jury.

Q. But there was no discussion at all about the number of Negroes to be included? A. I don't think there was.

Q. You say you don't think there were. Are you sure about that? A. No. I don't think he said to put twenty or ten or anything like that, no. We ended up with 44, and when we got through we told him the figures we come out with and he said he [83] thought that was fine.

Q. Before you drew up the grand jury, did you know how many you were going to put on it? A. Before?

Q. The total number of jurors, black and white, that you were going to put on it. Did you know before you drew up the grand jury how many you were going to put on the grand jury list? A. Two fifths of the total number that we had here.

Q. And that would be 121? A. Yes sir.

Judge Bell: That is the Georgia law, isn't it?

The Witness: Yes sir, not to exceed two fifths.

Q. Was there any discussion about how many of those 121 should be Negroes? A. No, there wasn't any discussion about how many should be, but we ended up with 44 and everybody agreed that was sufficient.

Judge Bell: It was drawn by lot. Doesn't your Report say it was drawn by lot?

The Witness: Yes sir.

Judge Morgan: At random?

Judge Bell: No. When they took the grand jury, they took all of the traverse jurors and drew them out by lottery. [84] Wasn't that the way you did it?

The Witness: Yes sir.

Judge Bell: All right.

Q. Did you physically draw out a card, or what document or paper did you draw out in drawing the grand jury? A. We made the cards up, as I testified before, of the people who were accepted. We put all the cards in alphabetical order. We went through. We taken the A's, the first name, it was put to the left. The second A was put to the right.

1, 2, 4, 6 on through like that. When that was through, we taken these cards that were even numbers, we typed them on big sheets of paper, and from that list of names we gave them to the Clerk of the Court who typed them on little pieces of paper, and those were tore in strips and were put in a jury box and it was closed up and it was turned round and round and we opened it up. There was another box open and we reached in there and got a name out, we called that name out, and wrote it on there and put it in another box. That's the way we done it.

Q. So that's the way you drew up the grand jury list?

A. Yes.

Q. And you had no idea as to how many Negroes you included? A. We didn't have any idea and we ended up with 44 [85] and we thought that was sufficient.

Q. Now with respect to the election list, how many election lists did you have. A. We had one.

Q. One election list? A. Wait just a minute. We had two the first day we started. That was the first thing we did. Mr. Watson, who is Chairman of the County Commissioners, called the Secretary of State's office, and asked him to please send us a voters list of the last election, and I believe we received it Tuesday afternoon.

Q. And was this marked by race? A. No sir it was not.

Q. There was nothing to indicate the races on the voters list? A. No sir, there was not.

Q. Was it in alphabetical order? A. No. I think there was a supplement list, but it was not in alphabetical order.

Q. Was it by militia districts? A. I believe it was, yes.

Q. It was by militia districts? A. Yes, I believe it was.

Q. Militia districts have racial concentration, do they not? [86] A. Well, I would think some of them would, yes.

Q. Particularly Militia District 606, is that right? A. There is not a 606 Militia District in Taliaferro County.

Q. Your testimony there is not? A. Yes.

Q. How about 604? A. 604?

Q. Yes sir? A. I couldn't say.

Q. Springfield and Linesville Districts? A. Linesville and Springfield, the way it was listed on the voters list that we had it ended with 601, which is Crawfordville.

Q. Were the names listed under each Militia District in alphabetical order, or listed by postoffice, or how? A. I think they were listed in alphabetical order.

Q. Do you have a copy of that list available with you? A. No, I do not. If you need it, I can get one.

Judge Bell: The Secretary of State, I think, has got plenty of them.

The Witness: Yes sir.

[87] Mr. Moore: Well, they have them, Your Honor. They can be photocopied and put in evidence.

The Witness: I don't have one with me.

Judge Bell: The Secretary of State will send you one and you can put it into evidence, if you want to.

Mr. Moore: I would like to put it in evidence. I would like to get a copy of the list they actually used.

Judge Bell: But he says he has not got it with him.

The Witness: I don't have it with me, no.

Mr. Moore: He can make it available, Your Honor.

The Witness: We will be glad to make it available.

Judge Bell: Well, they may have it all marked up.

The Witness: No sir, it is not marked up, no sir.

Judge Bell: Well, if they haven't marked it up some way you might have it.

Mr. Bloch: Do you want us to put it in the record?

Judge Bell: We don't need it in the record, but if he wants it he can get it and put it in evidence. That's up to him.

Mr. Moore: I would like to have it, Your Honor.

The Witness: I can get one from the Secretary of State.

Judge Bell: Well, let him have that one and put it into evidence—over 2,000 names.

The Witness: That's right.

Judge Bell: Let me ask him a question, since you are about to run down. Let me ask him a question. These various [88] category of people, some of them you couldn't find, and some that didn't stay around long, did you keep those names separately?

The Witness: Yes sir.

Judge Bell: Have you got all of those names?

The Witness: Yes sir.

Judge Bell: I suppose it would be a simple matter, if anybody wanted to know, how many of them were Negroes and how many of them were White?

The Witness: Yes sir, they could find out.

Judge Morgan: Do you have a list of the dead people?

The Witness: Yes sir, I have a list of the dead people.

Judge Bell: Mr. Moore wants to know how many of those 93 were dead. That would be both Negroes and White and it would be easy to find out.

The Witness: I will be glad to show him.

Judge Bell: Why don't you put that into evidence, Mr. Bloch?

Mr. Bloch: How is that?

Judge Bell: He says all of these categories on Page 4. There are 79 people who are under 21 years of age. He has a list of those.

Mr. Bloch: Was that 79?

Judge Bell: Yes. He has a list. This prolongs the thing, but he does have that list, Mr. Moore.

[89] Mr. Moore: We would like to get a copy of it.

Judge Bell: He says that he has got all of these categories. If anybody wants to know how many Negroes, they can go out and find out.

Mr. Bloch: List of categories on Page 4.

Judge Bell: Page 4. 33 names on Page 5. They are on the list twice.

Mr. Bloch: In other words, where it says "poor health and overage 374", and we are to furnish who are those 374?

Judge Bell: Right.

Judge Morgan: What is the Georgia law now in regard to those over 65.

Judge Bell: Now, that's automatic, isn't it? OVERAGE?

Judge Morgan: What is the age limit in voting in Georgia? It's 18, isn't it, but the service on the jury, what is the prerequisite?

The Witness: 21.

Judge Morgan: 21?

The Witness: Yes sir.

Judge Morgan: So, there is no discretion. Anybody between 18 and 21 were automatically eliminated, like we have to do in the federal courts.

Mr. Bloch: That was one of the questions that we discussed in Macon, the difference between 18 and 21, and—

[90] Judge Morgan: Anyone under 21 years of age were eliminated as required by the law?

The Witness: Yes sir. He was talking about 514, there are a lot of people who work in Atlanta and different places and come home every week end.

Judge Bell: Now, that's a thing that requires a lot of work—

The Witness: And people in the Service.

Judge Bell: —To get this thing up.

The Witness: Yes sir, it sure does.

Judge Bell: Now, there are 514 here. I think probably due to the nature of this case it would be well to put all of these categories in. Let the Court say this: It wouldn't be anything against the law if the next time you get ready to get your list up the Clerk of the Jury Commissioners, he could hire a Negro, couldn't he?

The Witness: Yes sir.

Judge Bell: You don't have a Negro on your Board, and so the plaintiffs say: "What's going on there"? "We don't know what is going on. We didn't have anybody over there to see what was going on." That's the same way with the school board, you see. We found that to be true in the Birmingham case. The first thing they did was to get some Negroes to work on the Jury Commission, and then everybody understood what was going on. That would be something that you could [91] do, see.

The Witness: We will be glad to. Lets not say that it wouldn't be a good thing to put a Negro on

the Jury Commission but since there is not one of them there you could get the clerk who is.

The Witness: Yes sir.

Judge Bell: And then you wouldn't have all of this.

Judge Scarlett: Would that guarantee to be the end of it?

Judge Bell: No, he is not guaranteeing it. I am just giving them a suggestion.

Judge Scarlett: But would somebody guarantee that that would be the end of it?

Judge Bell: I don't know whether we will ever have the end of it or not. Mr. Moore, do you have anything else you want to ask him?

Mr. Moore: No sir. We would like to see the copy and see the list before we tender it into evidence.

Judge Bell: They are going to put them in.

Mr. Moore: We would like to see copies of them.

Judge Bell: See what?

Mr. Moore: We would like to see copies of them and see the list before they are tendered into evidence.

Judge Bell: Off hand, it looks like if you could get every Jury Commission in Georgia to do this you ought to be well satisfied.

[92] Mr. Bloch: Well, what I propose to do is to send it to the clerk with a copy to him. I am not going to ask him if I can send it to the clerk.

Mr. Moore: I would like to know if I could withdraw it from the Clerk's office. I don't want any bootlegging into evidence.

Judge Bell: What do you mean by that? What are you talking about?

Mr. Moore: I want to look at it and examine it, Your Honor, before it becomes a part of the official record.

Judge Bell: Well, you want it to either go into evidence or not. We are not going to run this case forever. We have got other cases you know. I want to get that over to you. You know other people have rights.

Mr. Moore: Yes sir.

Judge Bell: And other people have got a right to have their cases tried.

Mr. Moore: Yes sir.

Mr. Moore: Yes sir, but we would like to request a copy of this list.

Judge Bell: Well, he is going to put it into evidence, and send a copy to you.

Mr. Moore: Yes sir. Very well.

Judge Bell: That is all he can do. We can't run a [93] side court, or side hearing, and have one going on between you and Mr. Bloch on whether or not you are going to agree to put something in when we have already discontinued the hearing, see. Let him put it into evidence and you will get a copy of it.

Mr. Moore: All right, sir.

Judge Bell: And it will be filed subject to your objection.

Mr. Moore: All right, sir.

Judge Bell: If you want to object, you can file an objection to it. All right, anything else you want to ask this witness?

Mr. Moore: No sir.

Judge Bell: Do you want to ask him any more questions, Mr. Bloch?

Mr. Bloch: Just one or two more questions.

Judge Bell: All right.

Redirect Examination by Mr. Bloch:

Q. In addition to what you have testified with respect to the instructions that Mr. Owens and I gave you in Macon with respect to your duties in following out the Court's directions [94] at that time, we had not seen the order of Judge Stephens at that time, had we? A. No sir.

Q. And in addition to what you have stated, I also recited to you the oath that a traverse juror had to take, "that you shall well and truly try each cause submitted to you during the present term" and so forth? A. Yes sir.

Q. And I told you that I thought you were entitled to consider that as a part of your guidelines? A. Yes sir.

Q. And also, in as much as the grand jury list was selected from the master list, that you should take into consideration the grand juror's oath, which is, in substance, that the grand juror keeps secret and inviolate and so forth, and that you could consider that in connection as to his uprightness and intelligence? A. Yes sir.

Judge Bell: All right, now you can go down, Mr. Griffith. Thank you very much.

The Witness: Thank you, sir.

Judge Bell: All right, now, we will take about a ten minutes recess and then we will wind it up.

(Note: At this point the proceedings were recessed for about ten minutes after which the proceedings were resumed as follows on next page.)

[95] MRS. LOLA WILLIAMS, was next called as a witness for the defendant, and after having been first duly sworn the truth, the whole truth and nothing but the truth to tell, testified as follows:

On Direct Examination by Mr. Bloch:

Q. Mrs. Williams, I believe that the Court knows that you are the Superintendent of the Taliaferro County Board of Education? A. Yes sir.

Q. You are Mrs. Lola H. Williams? A. Yes.

Q. Mrs. Williams, the present composition since February 6th, 1968, of the Taliaferro County Board of Education is Mrs. Willie Mae Fambrough, Chairman, Mr. Carl Chapman, Vice Chairman, Mr. Casper Evans, Mr. Horace Hill and Mr. Moore Pitman, is that correct? A. Yes.

Q. Now, the Chairman of the Board of Education, Mrs. Willie Mae Fambrough is here, is she not? A. Yes.

Q. She is the lady on the front row out there, on the left there? A. Yes.

[95] Q. Who prefers, by reason of her health, not to testify? A. Yes, sir.

Q. But she is here in court if the court wants her? A. Yes sir.

Q. With respect to that membership of the board, which I have just read to you, Mr. Moore Pitman was appointed by the board, or selected, by the Board at the meeting of October 3rd, 1967, was he not? A. Yes sir.

Mr. Bloch: Mr. Moore, I believe that Mr. Owens furnished you copies of these Minutes of the Board of Education?

Mr. Moore: I subpoenaed the Minutes, but I haven't been furnished with copies.

Judge Bell: He asked you if Mr. Owens furnished you with copies?

Mr. Moore: No sir.

Mr. Bloch: I will give him a copy.

Judge Bell: All right.

Mr. Bloch: Because I want to withdraw these originals.

Judge Bell: All right.

Judge Searlett: Where is Owens today? He didn't come down?

[97] Mr. Bloch: He is tied up on a case.

Judge Searlett: What?

Judge Bell: He said he was tied up on a case. He brought Mr. Hall with him.

Q. I call your attention, Mrs. Williams, to the Minutes of October 3rd, 1967, and the recitation particularly there in "Resignation of two board members reported to the board, Horace Williams, Jr., and Dillard Noggle"? A. Yes.

Q. According to Georgia School Law, Code Section 32-905, it is the duty of said board to elect or appoint to fill vacancies until the next term of court at which time these or others shall be appointed by the grand jury. The board appointed at this time Mr. Moore Pitman and Larry Beasley—

The Reporter: —Who? State that again.

Mr. Bloch: Mr. Moore Pittman, of Raytown, and Mr. Larry Beasley.

Q. Now Mr. Pittman is still a member, is that correct? A. Yes.

Q. Now, at the meeting of January 25th, 1968, January 25th, 1968, it reads "The Taliaferro County Board of Education met for a special meeting in the Superintendent's Office Thursday afternoon, January 25th, 1968 for the [98] specific purpose of accepting the resignation of Larry Beasley and electing a member of the Negro race to replace Larry Beasley until the next grand jury meets. Casper Evans, Sr. was elected by the Members of the Board of Education to serve from district 606." Now, that is the way the Minutes read? A. Yes.

Q. Is that correct? A. Yes sir.

Q. Then on February 6th, 1968, the initial paragraph is "The Taliaferro County Board of Education held its regular monthly meeting on February 6th, 1968, at 10:00 A. M. in the Courthouse at the Superintendent's Office. The following members were present: Mrs. Willie Mae Fambrough, Chairman, Mr. Carl Chapman, Vice Chairman, Mr. Casper Evans, Horace Hill and Mr. Moore Pittman? A. Yes.

Q. They were all there? A. Yes.

Q. And I notice in there this paragraph: "The new member, Mr. Casper Evans, Sr., was welcome to the Board and a book "Whatever a board member wants to know" was presented to him." Is that correct? A. Yes.

Mr. Bloch: That's all.

[99] Judge Bell: All right. Are you going to have copies of those made?

Mr. Bloch: I think I have them already.

Judge Bell: All right.

Mr. Bloch: And I will give him a copy.

Judge Bell: All right.

Cross Examination by Mr. Moore:

Q. Mrs. Williams, do the Minutes show at what time the meeting on October 3rd, 1967 was held?

Mr. Bloch: I read it. The Taliaferro County Board of Education held its regular monthly meeting on February 6th, 1968 at 10:00 A. M.

Judge Bell: He said the meeting of October 3rd.

Mr. Bloch: The October meeting?

Judge Bell: Yes.

Mr. Bloch: "The Taliaferro County Board of Education held its regular monthly meeting at 10:00 A. M., in the courthouse with the following members present:"

Mr. Moore: That's October 3rd, 1967.

Q. Now, Mrs. Williams, was any published notice given of the meeting? A. Which meeting?

[100] Q. The meeting of October 3rd, 1967? A. I am not sure that any public notice was given of that particular meeting.

Q. Was any public notice given of the meeting of February 6th, 1968? A. February 6th?

Q. Yes, Ma'am? A. I am not sure of a public notice of that meeting. We do not give a public notice of every board meeting.

Q. What is the practice with respect to giving public notice of board meetings? A. Mr. Bloch—I gave all that information to Mr. Owens in a letter.

Mr. Bloch: What was that question? I was trying to get these copies up.

Judge Bell: Wait a minute. Ask the question again, Mr. Moore.

Q. What is the practice with respect to giving public notice of board meetings?

Judge Bell: Mrs. Williams can answer that question. Just a minute. The Court at the last hearing instructed counsel, Mr. Owens, to furnish us with any notices that had been given in the past year or so. I have forgot whether it was a year or two years of meetings and some data when the meetings were actually held. You remember that one of the charges were that you had [101] been having secret meetings, that you had been having meetings and that nobody in the Negro community could find out when the board was going to meet and we wanted to get these notices to see if you actually held meetings when the board set the meetings to be held. Mr. Owens was going to get that information for the court.

Mr. Bloch: I have a bunch of newspapers with advertisements in them.

Judge Bell: Well, that is what Mr. Moore is asking about. He wants to know what the practice has been. Now, Mrs. Williams, can you answer that?

The Witness: Yes.

Mr. Bloch: I will give them whatever we have got.

Judge Bell: All right.

The Witness: According to the law we are supposed to—we can change a date, at least twice. I think, during a year, and if we do to publish this date, and usually it is set at the beginning of the school term. Well, we have, through the years, and I did write all of this in a letter to Mr. Owens to

be turned in as information. I believe, in 1963, we put a notice in the paper that the time would be moved to eight o'clock at night, and it had always been since 1933—I went back through my Minutes—at 10:00 o'clock, first Tuesday meeting—

Judge Bell: Ten o'clock in the morning?

[102] The Witness: Yes sir. Until this eight o'clock, which was published. We had not been publishing unless there was a change, a big change, which there had not been. At the eight o'clock it was put in the 1963 paper which I sent to Mr. Owens and which I got out of the Ordinary's Office, and I also stated the reason we did that was because I was having to act as principal and superintendent at that time and we had our ball games—anyway it was better that we meet at night, therefore we did publish that, and we have continued to meet—there may have been at 7:30 but I don't think that would be—you know, we changed time, I don't think that is relevant because—

By Mr. Moore:

Q. —Let me ask you this, did you meet from 1963 to 1968 at eight o'clock at night? A. I was fixing to point out, at 7:30, as you will note in some of the Minutes, it was at 7:30, but as you know last spring we changed the time here in Georgia, but if anybody wanted to come certainly the thirty minutes would not have hindered them to wait or to be there because that would really be earlier, but any other special meeting I minutes showed that we have had very few, if any, special meetings except at this hour, and the only other change would be on a Labor Day in which we

would put a notice out at the courthouse on the bulletin board that we would meet the next day, but as our Minutes show we did not hinder this other group from coming to the meeting, but—

[103] Judge Bell: Well, wait a minute. You are answering something he hasn't asked you about. He just wants to know about the times.

Q. Now, Mrs. Williams, in 1963 you met at eight o'clock on the first Tuesday in the month, is that right? A. We started meeting on Monday night at eight o'clock.

Q. And you changed it? A. Yes.

Q. And you changed it in 1963 until 7:30? A. Yes, it was either 7:30 or 8:00 o'clock that we met and everytime since then except on one occasion or two if it was a Labor Day or a New Year, something like that.

Q. Now, the practice that you stated generally, which commenced in 1963, did it continue up until the school year of 1967-68? A. Yes.

Q. Now, during the school year 1967-68, did you change your meeting time? A. Yes, we did. We changed the meeting time.

Q. When did you change the meeting time and to what? A. I believe the Minutes will show that we changed it back to the old original time, to the morning time.

[104] Q. At 10:00 o'clock on the First Tuesday? A. That is correct.

Q. Did you run a notice of the change? A. We have since then. It was not and I think that we have an edition of the paper that showed that Mr. Carey Williams acknowledged publicly, the publisher, that it was not published through his error.

Judge Bell: Let me get this straight. When did you change to the 10:00 o'clock meeting?

The Witness: Back in September of 1967.

Judge Bell: Last September?

The Witness: Yes sir.

Q. And your testimony is that wasn't published immediately through an error attributed to the publisher? A. That is correct.

Q. I see.

Judge Bell: Now, when was the notice published by him?

The Witness: And then we have put another one in and we have run it three weeks now.

Judge Bell: Since last year?

The Witness: Yes sir. And Mr. Williams acknowledged in there that it was through error that it was not in the paper.

Judge Bell: All right, go ahead.

Q. And when did he first acknowledge that there was an error? [105] A. Well, I called him because I wanted everybody to know about it.

Q. Was it before or after this court that— A. —Yes, afterwards.

Judge Bell: You say it was afterwards?

The Witness: Yes sir.

Q. You called Mr. Williams? A. Yes sir.

Q. And at that time he acknowledged that he had made an error? A. Yes, he did.

Q. Do you have any record or correspondence that would show the notice which your office communicated with Mr. Williams since 1967? Any published notice? A. No.

Q. And the meeting time now is at 10:00 o'clock in the morning? A. Yes, 10:00 o'clock in the morning.

Q. And what is the reason for meeting at 10:00 o'clock in the morning? A. Well, that has always been the original time of meeting, like most other meetings are usually held. I think in most places that has always been the practice except on some special occasion.

[106] Q. Are your meetings attended by Negro parents of Taliaferro County? A. They have been.

Q. They have? A. Yes.

Q. Did the Negro parents of Taliaferro County attend your meetings in September of 1967, October, November and December? A. No.

Q. Have they attended any of your meetings since the court met? A. No.

Q. Have they attended any of the meetings since the hearing in Augusta in the case in which you were involved? A. We have the Minutes at the last time that—

Q. I am asking you if Negroes attended the meetings? A. Well, the date is in the Minutes, as I pointed out. I am not sure what date that was. I think it was in December of 1966. I am not positive.

Judge Bell: He means since the hearing in Augusta a month ago?

The Witness: No sir. I said no.

Judge Bell: You have not had any Negroes attend the meetings?

[107] The Witness: No, sir.

Judge Bell: Well, you had Mr. Beazley attend?

The Witness: Yes. He is a Negro.

Judge Bell: He is a Member of the Board of Education?

The Witness: Yes, sir, he is a new board member.

Judge Bell: Well, he is a member of the Board of Education?

The Witness: Yes.

Mr. Moore: Not Mr. Beazley. Mr. Evans.

Judge Bell: Evans. Mr. Casper Evans, Sr.

Mr. Moore: Right.

Judge Bell: But you mean some parents, or patrons of the school, who were interested in the school?

Mr. Moore: Yes sir.

Q. Now, Mrs. Williams, did you give public notice of the existence of the vacancy on the Board of Education? A. That is the duty of the Clerk. He always has it put in the paper.

Q. Clerk of what? A. Clerk of the Court.

Q. Aren't you the Ex-officio—or aren't you an Ex-officio Member of the Board of Education? A. Yes sir, that's correct.

Q. And you are its administrative arm or officer? A. Yes.

[108] Q. That is with respect to board matters too, isn't it? A. Yes sir, that is correct. I believe the Georgia law says that he should be.

Q. Does the Board of Education give you any instructions, as clerk, of the existence of a vacancy on the Board of Education? A. No. I have never had to do that.

Q. Was any public notice given to the parents of Taliaferro County of the pending election of Mr. Evans to the Board and Mr. Moore Pittman? A. No.

Judge Bell: Is there any law that requires that, Mr. Moore, or are you just asking it as a fact?

Mr. Moore: Your Honor, I would not want to state in my place whether it was the law or not. I am not sure.

Judge Bell: All right. You just want to know as a matter of fact if it was?

Mr. Moore: Yes, Your Honor.

Judge Bell: All right.

Q. Was any public notice given to the parents of Taliaferro County that Mr. Evans had been elected to the Board of Education? A. No.

Q. And that same thing would be true as to Mr. [109] Moore Pittman? A. Yes.

Q. Now, Mrs. Williams, what is your connection with—

Judge Morgan: —That would be in the Grand Jury Presentment which is required to be published.

Mr. Moore: Let me ask that question, Your Honor.

Q. Does the election of Members of the Board of Education appear in the Grand Jury Presentments? A. Yes.

Q. And the Presentments are published? A. Yes.

Q. As the affairs of the grand jury? A. Yes.

Q. Now, do you have any knowledge as to who nominated Mr. Evans for board membership?

Judge Morgan: How could she be in the Grand Jury room?

Judge Bell: You mean the School Board.

Q. Strike that. Does the Board of Education make suggestions of nominations of names of persons to fill vacan-

cies on the Board of Education to the Grand Jury? A. I believe, in this instance, never, that I know of. I don't know of any having talked to any grand jurors. I know for myself I have not. Now, this particular—

[110] Judge Bell: —Well, now, you all are getting off the track. What he is trying to find out is who, among you and the Board of Education, nominated Mr. Evans?

The Witness: Well, the Board of Education.

Judge Bell: Well, don't you send the names to the grand jury?

The Witness: No sir.

Judge Bell: Or to the Judge of the Superior Court?

The Witness: No sir. We never have in the past, but since we were told or asked or petitioned that we felt that in this situation we were in that they were told, that the grand jury was told, I believe, that there would be an appointment. They had to be told that this appointment had to be filled.

Judge Bell: I thought, under the Georgia Law, the School Board selected people to fill the vacancies.

The Witness: Yes sir.

Judge Bell: Until the grand jury convened again?

The Witness: But they are not bound to go by what we have done.

Judge Bell: I know. But did you select Mr. Evans?

The Witness: Yes sir.

Judge Bell: Did the School Board select Mr. Evans?

The Witness: Yes sir, they certainly did.

Judge Bell: And you selected Mr. Pittman?

The Witness: Yes sir.

[111] Judge Bell: All right. Now, how, in the nature of things did it happen that the grand jury chose the same two people? Don't you suppose they must have known something about them being on the Board of Education?

The Witness: Yes, they did know.

Judge Bell: All right, that is what Mr. Moore is trying to find out.

Judge Scarlett: Wasn't the presentiments of the grand jury published in the paper?

The Witness: They will be. We haven't had time yet.

Judge Bell: They haven't got to that yet. Now, Mr. Moore, you are trying to find out who suggested Mr. Evans' name in the Board of Education meeting?

Mr. Moore: Yes sir.

Judge Bell: That is what he wants to know.

The Witness: Well, now, that does not happen to be in the Minutes, I don't think, as to who made the motion but it was either Mr. Chapman or Mr. Hill.

Q. Was there any discussion of the qualifications of Mr. Evans for board membership? A. Well, no, not that I know of. I suppose they thought about it thoroughly before his name was placed in nomination.

Q. Was there any discussion about the nomination of Mr. Evans before his name was placed in nomination? [112] A. Well, I don't think, in the situation, I naturally being the one that came to court in Augusta that there was anything wrong with my discussion. I did talk with the board members as to what we were going to try to do in the situation.

Q. So your answer is that you did participate?

Judge Bell: Well, Mr. Moore, the Court made a statement in the court room to Mrs. Williams and everybody in Taliaferro County that it would be a very good idea to get not one, but two Negroes on the Board. I just happened to read it on yesterday. Apparently what you did, you went back home and got busy and you found Mr. Evans?

The Witness: Yes sir.

Judge Bell: And you appointed one Negro?

The Witness: Yes sir.

Q. Did you consider any other Negro for nomination to the Board of Education? A. The Minutes show that he was the one that was chosen.

Mr. Bloch: I have no objection particularly, Your Honors, but I can't see the materiality of that under the complaint here. The complaint of the plaintiffs is that there was no Negro on the Board of Education. Now, we have elected one and now they are going beyond that and complaining about who it is.

Judge Bell: Well, he is going to get around in a [113] minute and is going to claim that Mr. Casper Evans, Sr.—I suppose he is going to get off into the idea that he is not the right kind of Negro.

Mr. Bloch: Well, is that material?

Judge Bell: Is that where you are heading, Mr. Moore?

Mr. Moore: I think that is rather apparent, Your Honor, but our contention is this, Your Honor, that the procedure in the County does not lead to the election of competent people.

Judge Bell: Now, what would happen, Mr. Moore—I don't know how this is going to work—but by setting up this new jury system presumably somewhere along the line the democratic process will work, but we will let you ask the question about Mr. Evans, if you want to, and see if they considered anybody else, and if they tried to find under the Georgia Constitution a man who is favorable to elementary education the way that the constitution says, or something like that. You can ask that.

Q. Mrs. Williams, it is your testimony that there was no discussion of the qualifications of Mr. Evans for membership on the Board of Education? A. That was understood that he was qualified, that he was board membership caliber.

Q. But was there any discussion of his qualifications? A. No, not to me. He was put in nomination and elected.

[114] Judge Bell: He asked you if you discussed any other possible candidates?

The Witness: No. He was the one that the Board selected.

Judge Morgan: The Board was just making a temporary selection. The Grand Jury was the one that actually elected them.

Q. Was there any effort to contact anybody or any parents in Taliaferro County, particularly the plaintiffs in this suit? A. No.

Q. Mrs. Williams, what is your connection with the private schools in Taliaferro County? A. None whatsoever.

Q. Do you have any children enrolled in a private school there? A. No.

Q. Do you visit the school frequently? A. No.

Q. Your testimony is that you absolutely have no connection with the private school? A. Absolutely not.

Q. Do you know whether or not formerly white teachers who formerly taught in the Taliaferro County Schools are now teaching in private schools? A. Some of them do.

[115] Q. Would that be a majority of them? A. No sir.

Q. How many white teachers were there previous to this, Mrs. Williams? A. I cannot recall.

Judge Bell: Wait a minute. Lets pursue this a little further. Last year, or at the last hearing rather, they said there were only 72 children in this private school. How many teachers do they have there? Do you have any idea?

The Witness: They don't have over five or six teachers.

Judge Bell: All right.

Q. What effort did you make as Superintendent of the Schools, under the direction of the Board of Education, to prevent the Taliaferro County School System from becoming an all Negro system?

Mr. Bloch: What's the materiality of that, Your Honor. It would be absolutely immaterial and irrelevant to the issue in this case.

Judge Bell: Well, it is possibly material on the idea that they have not had any Negroes on the school board.

Mr. Bloch: Well, everybody knows that.

Judge Bell: And that they are not favorable to the common school system because they let the white people all leave. I suppose that is it, isn't it, Mr. Moore?

[116] Mr. Moore: Yes sir.

Judge Bell: We will let him ask a few questions along that line. We won't let him get too far.

Judge Scarlett: How can Mrs. Williams control all of that?

Judge Bell: She is the Superintendent of the schools.

Judge Scarlett: I know she is School Superintendent, but she said she didn't know anything about the school, the private school there and didn't have any children in the school.

Judge Bell: This is really more probably addressed to the Board of Education Members. Mrs. Williams is elected by the Board and her qualifications are not the same as a member of the Board of Education who is supposed to be favorable to the Public School System.

Mr. Moore: Well, don't she act under their directions?

Judge Bell: You are asking her if she made—what effort she made—

Mr. Moore: —Pursuant to the directions of the Board.

Judge Bell: —Not to prevent them from having a private school. You have a constitutional right to have a private school, as far as I know, but you are trying to find out if she did anything to try to keep the White children from leaving the public schools?

Mr. Moore: Yes sir.

[117] Judge Bell: Well, she can answer that.

The Witness: Well, the schools are open to all of the children of Taliaferro County. We have the Taliaferro County Highschool, Taliaferro County Elementary School and it is open to all the children of Taliaferro County.

Q. The question is, what effort did you make pursuant to the direction of the Taliaferro County Board of Education to prevent the Taliaferro County Public Schools from becoming an all black one? A. We were directed to open the schools to all of the children and they are open to all of the children, and the Board is doing everything it can to run as good a school as we possibly can for all the children and those who select to go there and we intend to continue to do that.

Q. But you have done nothing to encourage the White children who live in the county attend the public school system? A. The school, as far as the equipment is concerned, is better than it has ever been.

Judge Bell: In other words, your answer is that you are maintaining a good school?

The Witness: Absolutely.

Q. I am asking you what have you done to encourage the white children to use the public schools?

Judge Bell: I think—well go ahead and answer it. [118] Well, I think it would be better for you to ask her—you seem to know a good bit about this subject—to ask her specific things, whether she has done specific things. I suppose whether or not she asked

people to return to the public schools would be one of the things—questions along that line.

Mr. Moore: All right, sir.

Judge Bell: Ask her along that line.

Q. What have you done to keep the faculty of the Taliaferro County School System from becoming an all black school? A. Those people who were already employed in the school system, if they were doing an efficient job I recommended them and the principals to the Board of Education.

Q. What did you do about the white teachers? You have white teachers in Taliaferro County. A. That was their prerogative to go where they wanted to go.

Q. What did you do to keep them? A. We couldn't keep all the teachers. Our teacher allotment wouldn't allow us to do that.

Q. You made no effort to keep the white teachers? A. We would have had to replace some of the Negro teachers had we done that.

Q. Now, if you had kept the white children in the public schools your teacher allotment would have been larger, wouldn't it? [119] A. Very little, if any, because we were already using local funds. Our situation is so small.

Q. Now, how many white teachers did you formerly have? A. I believe all of that was given. I can't remember. All of that was given in evidence, I think.

Judge Bell: At the last hearing?

The Witness: Yes sir.

Q. Mrs. Williams, you never—

Judge Bell: —At that time they had about 200 white children in the county. Now, they have gotten down to 72 according to the last hearing.

Q. Now, Mrs. Williams, did you visit the principals and superintendents in surrounding counties, Taliaferro County, and request them not to receive the white children from your county? A. I have nothing to do with that.

Judge Bell: She wouldn't have a thing on earth to do with that. In fact, we tried that case before. I told you over in Augusta that if you had any evidence that the adjoining counties were taking Taliaferro County children that you could reopen the other case, the injunction that we had in that case. Lets don't try that case again.

Mr. Moore: I am just trying to find out what they are [120] doing to try to maintain the public school system in Taliaferro County.

Judge Bell: Oh, well, all right, go ahead and ask her and then get into something else.

Q. Have you sent any letters or publications to the white parents in Taliaferro County to encourage them to remain in the county? A. No.

Judge Scarlett: Is that her business to do that?

Judge Bell: Well, if she is running the public schools it is conceivably could be, but I don't want the record to indicate or leave the matter in this shape, Mr. Moore, when the Court—the Court knows that to appoint a receiver in that other case two years ago the Receiver talked to Mrs. Williams and

the School Board, this is what the Receiver reported to the Court, to me, that he had arranged with the Taliaferro County School System so they could maintain a public school, that they would negotiate with Greene County and let Greene County take over and run the Taliaferro County Schools, run some kind of a contract, that is what the Receiver told them, and I think it would be very unfair for the record to show that the Taliaferro County people have done nothing to try to save the public schools because they did try to do that and they were not able to do it.

Do you know anything about that, Mrs. Williams?

[121] The Witness: Yes. We worked very hard. We tried everything we could to merge the system and up to this date we haven't been able to do it.

Judge Bell: And the break down was with Greene County, is what the Receiver told me and not with Taliaferro County. They tried to save this school system the best they could. What has now happened was about to happen. I will say that because in this other case the Receiver did report that to me and nothing ever came of it and so nothing was done. Obviously, that is the answer in the end when you have 400 children in a public school, in a whole public school system and it appears that it is going to be merged with an adjoining county.

Q. Mrs. Williams, do you have a PTA in Taliaferro County? A. No.

Q. When was the PTA discontinued in Taliaferro County? A. I don't believe they had a PTA in several years.

Q. When was the first year that it was discontinued? A. I am not sure, but I think it has been several years.

Q. About 1965? A. That might possibly been the last year.

Q. That is when you first had complaints from the black [122] community about the quality of the schools? A. I don't remember the year.

Q. And you do not have a PTA there at the present time, is that right? A. What?

Q. You do not have a PTA there at the present time? A. No.

Q. Do you have any present plans to organize a PTA in the immediate future? A. No. I do not have any plans. The board does not have any plans. The principals are at their pleasure with the faculty. The board has not told them that they cannot have a PTA, and the Superintendent has not.

Q. Did the parents of the black community come to the board and ask you specifically about having a PTA?

Judge Bell: Didn't we cover this the last time? Didn't you prove by some witnesses that they went to the meeting at night at the courthouse and said that they wanted to get them a PTA.

Mr. Moore: Yes sir.

Judge Bell: Did somebody come and ask you to organize a PTA or to permit one to be organized?

The Witness: That's right, and the answer was given that it was up to the principal.

[123] Judge Bell: Up to the principal?

The Witness: Yes sir.

Judge Bell: All right.

Q. Have you given any instructions to the principal to go ahead and organize a PTA? A. No, I haven't say to do it or not to do it.

Q. You haven't encouraged the principal to organize one?

Mr. Bloch: Your Honor, I object to all of that as being irrelevant and immaterial to the issue in this case.

Judge Bell: The objection be sustained. It has got to be a big issue in Taliaferro County about whether or not they are going to have a PTA. Mrs. Williams says that they can have one. All they have got to do is to organize one, if the principal agrees to it. I believe that is something that you could settle over there in Taliaferro County. The Court doesn't want to get into the PTA business this morning. Get on with something else, Mr. Moore.

Q. Is the principal hired by the Board of Education?
A. Yes.

Q. Is the principal nominated by you? A. Yes.

Q. Are you the supervisor of the principal? A. Yes.

[124] Judge Bell: The Minutes show that the principal can organize. Now, don't pursue this now. This is enough on this.

Mr. Moore: Your Honor—

Judge Bell: —You are trying to impeach her some way.

Mr. Moore: Your Honor, it is not meaningful for the principal to have the authority to organize a PTA if his superior doesn't encourage it.

Judge Bell: Well, we are going to terminate this line if questioning about the PTA. We are going out of the PTA business. You can get something done about that over there locally.

Mr. Moore: Your Honor, there is nothing that we can do though.

Judge Bell: Well, I don't know about that. We are not going to have a hearing on the PTA. So far as I know the Federal Constitution hasn't got a thing in the world to do with the PTA. We are not here to see about a PTA.

Mr. Moore: The federal funds go into this system.

Judge Bell: Talk to HEW about that.

Mr. Moore: Your Honor, we can't talk to HEW.

Judge Bell: Why can't you?

Mr. Moore: But we can talk to the Court if the Court will let us.

Judge Bell: Well, the Court is not going to get into the PTA business. We are going to let this rest right here just like it is. The Superintendent has said that it is up to the [125] principal if you want to have a PTA. Now, he may want to have one. I don't know about that, but that is as far as we are going this morning on this.

Judge Scarlett: And she has testified that she has nothing to do with it either for or against it.

Mr. Moore: Well, sir, she is an elected official of the County and she is to express the will of the people in that county. She allegedly is to respond to their peaceful initiative to implement the program and the program that they want she expresses no opinion on it.

Judge Bell: Well, have you heard of the writ of prohibition? If you want to remove Mrs. Williams from office you might go into Taliaferro County Superior Court and test her right to hold the office, but we haven't got a thing in the world to do with that. First, it is very doubtful that this should be a Three Judge Court, but we have gone along with it and we have had two hearings. We have accomplished a great deal of what we suggested to be accomplished in Augusta. We are now down to the PTA business. Now, Mrs. Williams runs for office. If you don't like the way she runs the office I would suggest that you get a campaign up to defeat her, get somebody else in office. That is the way the democratic process works. It is no federal court's business to be getting into this sort of thing, that I can see.

Mr. Moore: Well, a part of the democratic process is that the court vindicates the rights which are protected by the [126] Federal Constitution.

Judge Bell: You haven't got any right to have a PTA.

Mr. Moore: We do have a right not to have a system that has purposely kept off blacks and receive federal funds in which the parents are not able to participate.

Judge Bell: Mr. Moore, the system has not purposely kept all black. Now, there is no reason to make a statement like that.

Mr. Moore: Your Honor, there is no other explanation of the system.

Judge Bell: The explanation is that the white people don't want to go. They could have gone over

to the Baptist Church and go to school in the basement if they don't want to go.

Mr. Moore: They may not want to go but they are not encouraged to go.

Judge Bell: You can't make them go. You can't force them to go. So far as I know, there is no law to require them to go.

Mr. Moore: I don't believe you have to force them to go, but you can encourage them to go.

Judge Bell: You think if they organized a PTA they would all come back.

Mr. Moore: I think it would be a beginning.

Judge Bell: Well, lets don't argue this any more. Now, if you have anything else you want to get into, go ahead. [127] Lets finish up. Anything else?

Mr. Moore: No other questions.

Judge Bell: All right, you may go down, Mr. Williams.

Mr. Bloch: Your Honor, I am somewhat handicapped about those newspapers because Mr. Owens was expected to be here but he got into the trial of a case Monday morning and didn't get through, but he did hand to me—I don't know that there are all—but they are all that I have been able to find. It is a photocopy of the front page of the Advocate Democrat, Crawfordville, Friday, October 4, 1963, that has an advertisement in it:

"Board to meet on Monday night. The Taliaferro County Board of Education will hold its regular monthly meeting the First Monday night in each month at 8:00 P. M. in the courthouse."

Judge Bell: Well, I tell you, I think Mrs. Williams' testimony pretty well covers all of this, and

I don't believe you need to put these papers in unless Mr. Moore wants to put them in. She testified that they did change the meeting date from night to morning last September and never put a notice in the paper, that the notice did not appear. She now says that the editor acknowledges that it was his error and has now run the ad. That was the complaint that the plaintiffs had, that they didn't know when the school board met, that they would go to the night meeting and there wouldn't be anybody there.

Mr. Bloch: That's February 9th, 1968, on the front page it says this: "The Taliaferro Board of Education holds its [128] regular monthly meeting at 10:00 A. M. on the first Tuesday in each month in the courthouse in the Superintendent's office.

Editor's note: The above notice was received in time for last week's issue", which would have been February 2nd,—“but the copy was misplaced and therefore omitted from the paper.”

“Editor.”

Then on February 16th is this notice: “Meeting date of County Board of Education. The Taliaferro Board of Education holds its regular monthly meeting at 10:00 A. M., on the first Tuesday in each month in the courthouse in the Superintendent's office.”

That was the 16th. The 23rd issue is out today.

Judge Bell: What do they do when they have a special meeting? How do they give notice to the public? Didn't she say they put a notice on the bulletin board at the courthouse?

Mr. Bloch: That's all I know about it.

Judge Bell: All right, I think she testified to that. Now, do you have any other evidence you want to put up?

Mr. Bloch: Your Honor, there is present Mr. Bill Watson, who is Chairman of the Board of County Commissioners of Taliaferro County, who may be able to throw some light on those numbers who voted at the various elections.

Judge Bell: If he has the figures, it would be helpful.

Mr. Bloch: Come to the stand, Mr. Watson.

[129] W. E. WATSON, was next called as a witness for the Defendants, and after having been first duly sworn the truth, the whole truth and nothing but the truth to tell, testified as follows:

On Direct Examination by Mr. Bloch:

Q. Mr. Watson, you heard the question that the Court, the Presiding Judge just asked me with reference if you had any figures that would throw light on the question raised earlier in the hearing as to the number of voters and so forth. If you have that, will you put it in the record, or state it to the Court rather? A. If Your Honor pleases, I could go through numerically some figures and some reasonings—

Mr. Moore: Excuse me, I object to this witness testifying along those lines. There is no qualifications for this witness to testify about any figures at all.

Judge Bell: Well he has got the same qualifications that Mr. Turner had. Mr. Turner testified in Augusta that there were 949 people, the best he could tell from his survey, was registered and within a hundred of that number voted.

Mr. Moore: Mr. Turner stated his from qualifications and experience. One was his connection with a civic group that [130] was concerned about voter registration. Secondly, he was consultant to this civic group that was concerned about voter registration. We don't know anything about this witness.

Judge Bell: Well, he hasn't said anything yet.

Mr. Moore: Well, he is fixing to start talking about figures.

Judge Bell: Well, you can object when the time comes if it isn't right.

Mr. Moore: I object on the grounds that he is incompetent, Your Honor.

Judge Bell: You are attacking his qualifications on the voir dire?

Mr. Moore: I mean there should be some type of qualifications.

Judge Bell: Well, he is Chairman of the County Commissioners. He is a politician. If he is Chairman of the County Commissioners he is a politician and most politicians know how many people are registered to vote and how many vote.

Mr. Moore: We have the Voter Registrant, Your Honor. We subpoenaed her at the last hearing.

Judge Bell: Well, she is not here.

Mr. Moore: We subpoenaed her at the last hearing. She claimed that she did not get the subpoena but she was present and she didn't testify.

Judge Bell: Well, that objection will be overruled. If this man is incompetent to testify in this area we will soon [131] know. All right, ask him, Mr. Bloch.

Q. You are Chairman of the County Commissioners of Taliaferro County? A. I am.

Q. How long have you been Chairman of the County Commissioners? A. Approximately four years.

Q. Were you elected by the people of Taliaferro County? A. Yes, twice.

Q. Twice? A. Yes.

Q. Did you run for office? A. Yes.

Q. As Chairman of the County Commissioners do you try to keep up with the questions such as you are about to lay before the Court? A. Yes sir. If I hope to remain in office I have to, yes.

Q. Now, state what K asked you awhile ago, any information you have on the subject.

Judge Bell: Don't ask him any such general question as that. Ask him how many people voted in the last General Election in Taliaferro County, if he knows.

[132] Mr. Bloch: All right, sir.

Q. How many people voted in the last General Election in Taliaferro County, if you know? A. Between 1650 and 1675.

Q. All right, do you know how many of those were White and how many were Negroes? A. They were approximately 50-50.

Q. Approximately 50-50? A. Yes sir.

Q. Do you have anything to do with the voters list, or the list of registered voters in Taliaferro County? Is that made up by the Board of Registrars, or how? A. Yes sir, by a Board of Registrars.

Q. Who appoints the Board of Registrars? A. I think the Judge of the Superior Court.

Judge Bell: Well, he doesn't know. He is not on the Board of Registrars. You have asked him all we wanted. All we wanted was to get the figures. He said it was about 50-50. In so far as the Negro vote is concerned is exactly what Mr. Turner said, and that would leave about the same number of Whites.

Mr. Bloch: That's all.

Judge Bell: All right, do you want to cross examine him?

Mr. Moore: No sir.

Judge Bell: All right, all we wanted to get were the [133] numbers anyway. Thank you, Mr. Watson.

Mr. Bloch: Your Honors, I would like permission to offer in evidence photographic copies of these two originals, serving counsel with a copy. I think when he gets back to Atlanta he will find that he already has some but I don't mind give him another set at this time.

Judge Bell: All right. Any objections, Mr. Moore?

Mr. Moore: No objections, Your Honor.

Judge Bell: All right, they are admitted without objections. That will be Number 3, I think. Now, do you have anything else, Mr. Bloch?

Mr. Bloch: No sir.

Judge Bell: All right, then you rest. All right, Mr. Moore, do you have any rebuttal testimony?

Mr. Moore: Yes sir. Your Honor, we have a motion to intervene as an additional party plaintiff, Joseph Heath, who is here to testify as to the facts in his application.

Judge Bell: Why should we open up now and start a new case?

Mr. Moore: Well, he is a member of a class of persons who are already in the case. He is 54 years of age and is a Negro and he is not a freeholder in Taliaferro County and he has six children.

Judge Bell: You are trying to get around the fact that Mr. Turner cannot represent non-freeholders.

Mr. Moore: Well, our legal contention is that he can.

[134] Judge Bell: That's the idea of this intervention?

Mr. Moore: No sir. Our contention is that he can, but if anybody really wants to argue about it we can intervene in the other plaintiffs. It does not cause any delay. He wants the same relief as the existing plaintiffs.

Mr. Bloch: What is it, Your Honor?

Judge Bell: He says that he has got a man that wants to intervene in the case, so that he can represent the class entitled "Non-freeholders." Does he swear that he is not a freeholder?

Mr. Moore: Yes sir. He is present and he can testify to that.

Judge Bell: All that does is to make certain that the Court will reach the merits of the claim that an

application based on freeholders is unconstitutional. Do you have any objection to it, Mr. Bloch?

Mr. Bloch: The order says "Upon consideration of the above and foregoing the same is allowed and ordered filed subject to motions and objections." We have no objections to that. We have no objections to signing that order, and if any objections should occur we will let you know.

Judge Bell: All right, we will get Mr. Moore to agree to this, that all motions heretofore filed by the defendants would be as applicable to this intervenor as to the original plaintiffs.

Mr. Moore: Yes sir.

[135] Judge Bell: All right.

Mr. Moore: Everything in there—

Judge Bell: —So, we won't have to have any more pleadings.

Mr. Moore: That's right.

Judge Scarlett: You won't have to have any more evidence, will you?

Judge Bell: All your motions already filed will apply.

Mr. Bloch: Yes sir.

Judge Bell: Mr. Moore, sign that.

Mr. Moore: Your Honor, we have a motion for the allowance of reasonable attorney fees, supported by affidavits, and we would like to put on Mr. Turner for just a short rebuttal to the defendants' case.

Judge Bell: What about these attorney fees? Do you think you can support that by affidavits?

Mr. Moore: We can put a witness up, Your Honor.

Judge Bell: Let me see that. We will receive that motion for counsel fees and the affidavits on the condition that Mr. Block can file a counter affidavit, and we won't have to go into that today.

Mr. Bloch: Your Honor, they are not entitled to any attorneys' fees at all in this case.

Judge Bell: Well, you file a brief on that. I told you last year that the Fourth Circuit has been allowing some [136] attorney's fees.

Mr. Bloch: I had heard of this, but I didn't know for sure, and—

Judge Bell: —I think at the time of the last hearing the Fourth Circuit had allowed some attorney's fees.

Mr. Bloch: This is the first I heard of it coming up today. What direction is Your Honor going to give it?

Judge Bell: I am not at all surprised that he asked for attorney's fees. This is sort of a trend going on. I am just saying that he can file his motion and his affidavit and you can file a counter-affidavit and a brief saying that he is not entitled to anything. In other words, it is just a motion that he has filed now. It could have been filed after we disposed of the case as for that matter. It is sorta like a cost bill.

Judge Scarlett: Let me ask a question. How much attorney's fees are you asking for? It is just a matter of curiosity.

Judge Bell: Well, he says that his services are worth \$350.00 a day and he has it figured out to where it would run about ten days.

Mr. Moore: No sir. We figured out for the day we were down in Augusta. We put in about 74 hours.

Judge Bell: Your charges are just a little bit higher than mine was when I was a lawyer, but I am sure you are a much better lawyer than I was.

[137] Mr. Moore: They charge more than we do in Atlanta, Your Honor.

Judge Bell: I am sure that Mr. Bloch would be glad to get to charging on that basis.

Mr. Moore: Actually the charge is much greater by the hour.

Judge Scarlett: It is not what you charge. It is how much you can get.

Mr. Bloch: All I can say to this is "Your's received and contents noted."

Judge Bell: Well, that is just sort of a side issue. We will take that up at the proper time.

Mr. Moore: Yes sir.

Judge Bell: All right, proceed, Mr. Moore.

Mr. Moore: We would like to call Mr. Calvin Turner to the stand.

Judge Bell: All right, Mr. Turner, take the stand. Mr. Turner has already been sworn from the last hearing. You won't have to reswear him. Have a seat up there, Mr. Turner.

[138] CALVIN TURNER, recalled on behalf of the plaintiffs, testified as follows:

Redirect Examination by Mr. Moore:

Q. Would you state your name, please? A. Calvin G. Turner.

Q. Have you been a life long resident of Crawfordville, Taliaferro County, Georgia? A. Yes, I have.

Q. How long has that been? A. Thirty Six years.

Q. Do you know Mr. Casper Evans? A. I do.

Q. Can you indicate to the court how long you have known him? A. I have known Mr. Casper Evans, and if it please the Court, he is a relative, a distant relative of mine and I have known him since birth, since I was big enough to know anybody. In fact, he lives, not only in the Militia District that I live in, but he lives in the immediate community in which I live.

Q. And where is that? A. In the Springfield community.

Q. And what Militia District? A. It is in 606. In the 606 Militia District.

[139] Q. Do you know approximately how old Mr. Evans is? A. Mr. Casper Evans is about 71 or 72 years old.

Judge Bell: About the same age as your father.

The Witness: My grandfather, about the same age of my grandfather.

Q. Do you have any personal knowledge of Mr. Evans' educational background? A. Certainly by knowing him, by growing up in a community with him, going to Sunday School, church, my knowledge of Mr. Casper Evans is—well, I will say this: Is one of the poorest selections to represent Taliaferro County on the Board of Education possible.

Q. And why is that? A. Because, first of all, physically—I think when a man reaches 70 or 71 years old, who has retired from farming, who has retired from all of his occupations, and who will state to the community that he is too old, that he doesn't feel like getting out in the public any more than going to church, and he has made this clear

many times, because we have asked him if he would keep up, or would attend community meetings and community affairs, and this has been his statement everytime. He has made statements in the church that "I am getting old now."

Q. Do you know how far he has gone in school? A. My general knowledge of Mr. Casper Evans maybe the third or fourth grade and at that time a school year wasn't but, I believe, about six months.

[140] Q. When he was a boy? A. When he was a boy, yes.

Q. Do you know whether he has lived in Taliaferro County all of his life? A. He was born in Taliaferro, as far as I can go back and as far as the record will show, you know, he has lived there all of his life.

Judge Bell: Does he own his land?

The Witness: Judge, I can't answer that. He lives on the land that his son owns that was bought while he was in service.

Judge Scarlett: Does he live on the same place that he has been living all the time?

The Witness: He is living in the place that he has been living since I have known him.

Judge Bell: Does he have any children?

The Witness: He has some seven children. His baby, his youngest child is about 32 years of age.

Judge Bell: Is he a respected citizen in the community?

The Witness: He is a respected citizen as far as moral character is concerned.

Judge Bell: Has he made a living for himself, or has he been on relief? How has he lived all of these years?

The Witness: He has gotten by on his own all these years.

Judge Bell: But he is self reliant? Is he a farmer?

[141] The Witness: He is a farmer.

Q. Does he have any grandchildren in the Taliaferro County Schools? A. He does. He has four grandchildren by one of his sons, and I think he has some two, maybe, by his daughter. He has his daughter and son residing in Taliaferro County now.

Q. Did his children complete school in Taliaferro County, in the Taliaferro County School System? A. His son, his baby son, is a victim of a drop out in the Taliaferro County System. He has two daughters that has finished, as far as my remembrance, highschool back in the early forties.

Q. Now, do you know whether or not he has a reputation with the Negro Community of Taliaferro County as an "Uncle Tom"?

The Witness: Well, being a member of the Negro community, I think I would have to answer "Yes."

Q. What is meant by the phrase "Uncle Tom?" A. The phrase that is used in the Negro community as an Uncle Tom is a person who cannot exercise his constitutional rights because of economic reprisals that can be brought, and that is in turn people on welfare, who is drawing some type of old age assistance, a person who really has never had an opportunity to speak up for their rights and they are just afraid. Period.

[142] Judge Bell: Let me ask a question there. Might not you also consider a man an Uncle Tom

who won't participate in the most active, sort of an activist program that is going on? For example, if you wanted to march and block the school buses and this Mr. Evans wouldn't go with you and block the school buses, wouldn't you call him an Uncle Tom?

The Witness: Judge, no sir. In the terms in which we are using "Uncle Tom" is a person who does not speak up and stand up as the law provides, that is prescribed or interpreted generally throughout the community.

Judge Bell: What law, what right is he giving up?

The Witness: Well, he has stated in many cases that he didn't feel competent. He has stated this to the Negro community.

Judge Bell: That he didn't feel competent?

The Witness: Yes sir. I have seen him make excuses when it comes to intellectual involvement.

Judge Scarlett: Well, don't you think a lot of other people ought to do that when it comes to talking?

The Witness: State that again, please, sir.

Judge Scarlett: I said, don't you think a lot of people who claim to have intellectual attainment are better off if they don't get up and make speeches?

The Witness: I think so, but the question I asked he so chosed to do so.

Judge Bell: What I was getting at, Mr. Turner, it seems to me if I live, we will say, for example, if I lived in [143] Alabama and I didn't want to agree with Governor Wallace I suppose somebody would say that I was an Uncle Tom, so they would get a name up for me because I didn't want to do what the

strongest man wanted to do. I am trying to find out if you are trying to practice thought control over Mr. Evans because he won't do what you think ought to be done. You have a freedom in this country not to do what your neighbor wants to do. That's a big freedom. That is what I am getting at. Now, lets talk about that.

The Witness: All right. Judge, thank you, I think each time I mention or answer a question about Mr. Evans I brought the general thinking of the community, because we are talking about the community.

Mr. Bloch: Your Honor, I object to all of this testimony on the ground that there is no issue in this case made by the complaint, either by amendment or otherwise, as to the qualification of the member which has been legally selected in accordance with the processes of the Georgia law.

Judge Bell: Well, there is a general issue in the case that the democratic process hasn't been working over there in Taliaferro County, and they say it still is not working because they didn't consult with the Negro community about who they were going to put on the school board, and they put on a man that, at least in Mr. Turner's group in the Negro Community, don't like. They are not satisfied with him. I guess Mr. Evans could get him [144] up a crowd, or a group, who would say, "Well, this is our man." Anyway, let him go ahead and testify about whatever is in the complaint.

Mr. Bloch: Whether or not the democratic process is working in Taliaferro County is not a judicial question for a decision by a Three Judge Court.

Judge Bell: Well, I understand that, but whether the grand jury was illegally composed is a question, and we are running out of that question.

Mr. Bloch: Well, I suggest that Mr. Evans is elected for a term that expires in August of 1968, and—

Judge Bell: —They may have another man they want to put up at that time and if they do they can go to the grand jury. Of course, he was their man at that time. We know that, but let him go ahead and testify. He doesn't like Mr. Evans—well, he didn't say that he didn't like him. He said that he didn't think Mr. Evans was qualified. I don't want to put words in his mouth. He said he was related to him, as a matter of fact.

Mr. Bloch: It just so happens that his judgment as to the qualifications of Mr. Evans is not the guiding star in the election.

Judge Bell: I understand that. We are having sort of a town meeting here this morning.

Judge Scarlett: Well, I will agree with you on that. [145] Let me ask you a question, do you still live in that community?

The Witness: I still reside in Taliaferro County in the same community that I was born in.

Judge Scarlett: Didn't you testify the last time that you were working somewhere else?

The Witness: Judge, I believe I remember clearly what I said. I didn't make that statement. I never made that statement.

Mr. Moore: Answer Judge Bell's question.

Judge Bell: Well, let him finish with Judge Scarlett. Judge Scarlett if he said he was working off somewhere in another county.

Judge Scarlett: He said another community, I think. It has been a long time ago, but I recall him saying something about working somewhere else.

The Witness: The statement that I did make, the first trip to the Board of Education when the committee met and I was a part of that committee and the reason I wasn't present was because I was not available. That was the only statement I made.

Judge Scarlett: I thought somebody asked you—I may be mistaken—but my recollection is that somebody asked you where you worked and I thought you said that you were working elsewhere, or living elsewhere, or something like that.

The Witness: No sir.

Judge Scarlett: Well, I am in error then.

Q. Do you remember Judge Bell's question about [146] what they would call him if he was opposed to Governor Wallace over in Alabama?

Judge Bell: What would they call me?

Q. What would they call him?

Judge Bell: They would get up some name for me because I wouldn't join in with their group. I don't know whether it would be an Uncle Tom or not. I guess they would call me an Uncle John or something.

The Witness: I would like to answer Judge Bell's question. I think there is no comparison, first of all, because Governor Wallace is in Alabama and he represents the people of Alabama.

Judge Bell: But that doesn't mean that he represents everybody.

The Witness: Well, those people in Alabama would have to complain and that complaint maybe peculiar and unrelated to the one that we are making in that we are living in a community with the man that we live together real well. We see one another day by day.

Judge Bell: What I am getting at, Mr. Turner, is what right do you have to criticise another man, another citizen, because he doesn't think like you think? What right do you have to exercise thought control over Mr. Evans? What right do you have to do that?

The Witness: I don't have any right, but I think this [147] is a part of the democratic process.

Judge Bell: Did you try to persuade him?

The Witness: I can't say that we tried to persuade him because it is his constitutional right to feel like he wants to feel.

Judge Bell: Right.

The Witness: Or to react like he wants to react; but I think this is a part of the democratic process, I submit, that it is the community that he represents, and the people in that community which really is assigned to the 606 district knew nothing about the election of Mr. Evans, and if he is going to represent that district this certainly wouldn't be the democratic process.

Judge Bell: Well, that's true, but as Mr. Bloch points out he is only elected to August. Certainly you are better off to have a member on the board. You told us in Augusta that you couldn't even get

an audience before the board, that they wouldn't even let you appear there. Now, you have got a Negro on the board. You have got Negroes on the grand jury where you can get more Negroes on the board. I say that the merit system ought to prevail, and then if you have got a better man than Mr. Evans then you ought to get him on the board through the regular processes. We just can't set up a court supervised government. There is a break down in government if the courts have got to run it. You obviously don't think this man is qualified. That's the end of that. You just don't think this man is qualified. I don't think the Court should take any cognizance of the fact though that you [148] think he was an Uncle Tom. I don't think the Court should lend itself to any sort of thought control, of that sort.

Judge Scarlett: And I don't think the Court should get into the question of the election of Governor Wallace.

Judge Bell: I was giving that as an example.

Mr. Moore: He wasn't trying to control the thoughts of Mr. Evans. He was trying to explain to the contrary, that he recognized Mr. Evans' opinion. He is not chased out of the community.

Judge Morgan: You don't think, in your opinion, that this man truly represents the thought, a truly representative of your community, is that it?

The Witness: That's it. May I explain a little more. I think this would help the Court.

Judge Bell: All right.

The Witness: That there is Mr. Casper Evans, who has been selected by a majority of the grand

jury, which is made up of a majority of the Taliaferro County White. There is Mr. Evans' brother, his brother, who was recommended, if I am correct, I could be wrong, if this is the process, by the County Commissioners of Taliaferro County and approved by the State, whatever that process is. Then there is a Mr. Willie James Hughes who has been called in to suggest and advise a Jury Commission, and then there is a daughter-in-law of Mr. Willie James Hughes who also served as an advisor to select Negroes as a cross section of the county. [149] Now with that being two families generally this does not represent the Negro community and I think, if I am right, this is the question, that it is not—

Judge Bell: —Just a minute. What job did they give Mr. Evans' brother?

The Witness: He is on the Welfare Board.

Judge Bell: How many people on the Welfare Board?

The Witness: I think there are about five.

Judge Bell: He has been put on the Welfare Board?

The Witness: He was put on the Welfare Board, and they came right back and put a brother of his on the Board of Education.

Judge Bell: They haven't given Hughes anything. They just got him to help them with the jury list.

The Witness: Well, if we would go down the line, Judge, we can see where these families are certain people—the only problem that we have, I think, with this situation, is not important as to how many Negroes are representative of the Negro community,

but who selects those Negroes. This is the only problem that we have.

Judge Bell: If you have a properly composed grand jury, when you find out who the grand jurors are, the way you do is you go and talk to the grand jurors about whoever it is you want?

The Witness: We didn't have this opportunity.

[150] Judge Bell: I know that but this is a temporary thing. In August this man's term expires and somebody else's term will probably expire at that time too.

Mr. Bloch: Just one.

Judge Bell: Just one?

Mr. Bloch: There maybe some of the older ones.

Judge Bell: That's what I say. There might be some more. Then you find out who the grand jurors are and you go talk to them about it.

Judge Morgan: Let me ask this question —

Judge Bell: —Suppose we picked out a man? Suppose the Court picked out one, which the Court wouldn't do, but suppose we did it and then somebody who didn't agree with your philosophy would come in here and want to intervene and say you picked out a man who is under Calvin Turner's influence.

Judge Morgan: Let me ask this question: How many Negroes do you say in there that had a high school education, or a college education? You have a college education?

The Witness: I do.

Judge Bell: Where from?

The Witness: Fort Valley State.

Judge Morgan: In that community is what I want to ask you? How many in that community?

The Witness: Judge, it would have represented the [151] community very well if it had been even Casper Evans' son, who has children in school. There is another man who lives in that same community who has a Bachelor's Degree. There is another lady who lives in that community that has a Bachelor's Degree, and none of these people are affiliated in no way directly with the school system of Taliaferro County. I think this is the thing, if it pleases the Court, that really kinda disturbs that district, that there were people, if the Negroes had a chance to know or to suggest they certainly would suggested a man that would have been more beneficial to the Board and to the community.

Judge Scarlett: Well, gentlemen, don't you all think this is just foolish talking? Why go through all of this? He has got his remedy. As you so ably pointed out, Judge, with the exception of my Governor Wallace, that they can go before the grand jury and get some one else if the grand jury thinks it's proper. Now, that is your remedy. It is not our remedy.

Judge Bell: Well, we understand that the man who was selected, you don't think he was qualified, or was as qualified as several other people in the community?

The Witness: Yes sir.

Judge Bell: And you didn't have any way of knowing that this man was going to be selected, that the populace was not consulted, the citizens of the community. Now, Mr. Bloch, I want to ask you

and Mr. Moore one question. It seems to me that I heard somewhere that there is a new constitutional amendment [152] in Georgia whereby a county can get off the grand jury elected system—how do you get off of it? And just having elected school board people? Now, everybody has got some kind of an administrative agency coming into court and saying you have got to appoint more Negroes. I think you are going to finally just have an election, everybody is going to have to be elected, as near as I can tell.

Judge Searlett: That's what they are doing now. How do you get off that, Mr. Evans? Who knows that?

Mr. Evans: There was an amendment. It's set forth in my answer, an amendment, providing that by local law and a referendum of the people the county school boards, the method of selection of county school boards can be local by local laws.

Judge Bell: I mean does that have a local act and then a referendum?

Mr. Evans: Yes sir.

Judge Morgan: Well, isn't it true that formerly you just passed a local Act? You just took the election out of the hands of the grand jury?

Mr. Evans: No sir. Before it had to be a constitutional Amendment. You see, the Constitution of Georgia, in the first instance provides for the election of the County School Board by members of the Grand Jury. That is the standard system. A great number of counties, this is one of the constitutional problems that [153] the State of Georgia has had. There are probably 50 or 60 or more counties have through local constitutional amendments—

Judge Morgan: —I didn't know there was a constitutional amendment required but I know my county used to be by the Grand Jury and now they are elected by the people from the various districts, but I thought that was a local Act.

Judge Bell: Well, that's all right. We have got that cleared up now. Anything else you want to ask Mr. Turner?

Mr. Moore: Yes sir, one or two more questions.

Judge Bell: All right.

By Mr. Moore:

Q. Mr. Turner, are there other people in your community with greater educational attainment than Mr. Casper Evans?

Judge Bell: He has already said that.

The Witness: Mr. Casper Evans was taken from the lower bracket, the very lowest bracket, of those persons who have attained an education.

Mr. Moore: That's all.

Judge Bell: Mr. Bloch, you any questions?

Mr. Bloch: Yes sir.

Recross Examination by Mr. Bloch:

Q. Don't you suppose whatever Negro citizen in [154] Taliaferro County would be selected as a member of the Board of Education that there would be some of the Negro citizens who would not like that particular person? Answer yes or no.

Mr. Moore: Well, he has a right to explain his answer.

Judge Bell: Answer yes or no, first and then he can explain.

The Witness: Ask the question once more, please.

Mr. Bloch: Read the question, Mr. Watson.

The Reporter: Don't you suppose whatever Negro citizens in Taliaferro County would be selected as a member of the Board of Education that there would be some of the Negro citizens who would not like that particular person? Answer yes or no.

The Witness: Yes, in Taliaferro County, but we are dealing with a Militia District.

Judge Bell: Apparently one of these school board members is selected from each Militia District, is that a local custom they have there or is that the law?

Mr. Bloch: There is something in the law about it, I think.

Judge Bell: All right, anything else, Mr. Bloch?

Mr. Bloch: I want to ask him about his age.

Q. Did you say he was 71? A. I said about 71 or 72, about the age of my grandfather.

[155] Q. About the age of your grandfather? A. About his age. They grew up together.

Q. Are you complaining about his age? A. I am not. I did not complain about his age.

Judge Bell: He is having some fun with you. He is about that age.

Mr. Bloch: I am older than that, and so is Mr. Justice Black.

Judge Bell: Mr. Turner's grandfather testified two years ago in the trial in Augusta and he was asked to point out a witness, some Reverend who

had been preaching on the courthouse lawn. I said: "Where is he? Is he in the court room?" He said: "Yes, he is back there in the back." I said: "Who is he?" He said: "The man with the shade drawn." That was the Reverend that was doing the preaching. That was your grandfather.

The Witness: Oh, yes.

Judge Bell: He was in court testifying. You have to be very careful about saying anything about age if it is up around about 70.

Mr. Bloch: I was just wondering if he had any office in his church?

The Witness: He does.

Q. What? A. He is the Chairman of the Board of Deacons in his church.

[156] Judge Scarlett: What church is that?

The Witness: Friendship Baptist Church.

Mr. Bloch: That's all.

Judge Bell: All right, anything else?

The Witness: Judge, if it pleases the Court, I would like to make this statement. I think—well, what I think doesn't matter. But I think the majority of the Negroes are asking for this. It is not to be just agitating, but to be representative, to be represented. That is the only thing we are asking for now is to be represented. Now, I am wondering how can this be done without dealing with the Jury Commissioners. The Jury Commission is the thing that we want, because we could solve the Board of Education, and—

Judge Bell: —Well, you have got it now.

The Witness: The Jury Commission?

Judge Bell: You haven't got a Negro on the Jury Commission, but you have got Negroes on the jury list now, and the next time they draw a grand jury by lot you may have two thirds Negro on the grand jury.

The Witness: Let me ask this question, Judge, if you please. We have proven and established and I think the Court has accepted that there is 55 percent of the population in Taliaferro County is Negroes, and I think Mr. Watson and I both agree that there is about 50 percent registered voters who are Negroes, both Negroes and White, about 50-50, why couldn't the County Negro [157] community ask for 50 percent of the Jury Commissioners Negroes?

Judge Bell: Because the law doesn't give you that right. You don't have a right to apportion. You only have a right to a fair cross section. The Federal Jury List Examiner in Atlanta sent a card out to every fiftieth name on the voters list in the six or eight county area. Well, it turned out that the Negro population was 21 per cent and they only had 15 per cent on the jury. Nobody knows how that turned out like that. It just turned out like that. Now in this list here, if there is something wrong in one of these groups, 225 people unknown, 33 people on the list twice and that sort of a thing, then it can be called to the attention of the court, but as long as they have a fair approach to it you can't insist on it being exactly even. It could come out, when they draw by lottery these grand jurors you might have two thirds Negroes on that. It is entirely possible, just like this time you had two thirds white, but if you just get a fair list that is all you can insist on. That

is the law. The Supreme Court says that you have so many races and face in this country that the country would fly apart if you put everything on a percentage basis. How would you ever get a jury list examiner in New York City? We just never have done that in this country, but that doesn't mean that there is anything wrong, if you have been discriminated against, because it is not 50-50. There may be discrimination that is not an illegal discrimination, in other words. [158] Now, you would feel better, of course, if there had been a Negro Jury Commissioner, and then you wouldn't have all the doubts you have about it. Those things just have to be worked out. We are making a little bit of progress, as I see it. They are on the jury list now in Taliaferro County.

Mr. Moore: If I may be heard, Your Honor, just for the purpose of this case—I don't know what this Court's time table is—but on just the facts that have been proved in the case we would be pleased to submit these facts to a statistician and let the statistician—

Judge Bell: No. I don't pay anything to this statistician stuff. It's about to ruin this country by getting some mathematical professor somewhere to say that the probabilities are One Hundred Thirty Four Million to One that this couldn't happen. Now, we don't need anything like that. What you could help the court with would be to take these categories of names and see how many of them that were eliminated were Negroes and how many were White. That would help the Court more than anything else. That's a fact.

Mr. Moore: Your Honor, when we started on the basis of 50-50—

Judge Bell: You see, that's the trouble. You always get the cart before the horse. You can't just assume that the list ought to be 50-50. The Seventh Amendment is still in the [159] Constitution. You are entitled to have a juror who can understand jury proceedings.

Mr. Moore: That's a different question, Your Honor. What I am saying 50-50, is that the voting list, if we accept the testimony of the witness, that it is 50-50, that is, fifty percent of each race voted in the last election, that's one you have heard. If we take the universe from the Census tract of 1960 we find, Your Honor, that there are more Negroes in the county above age 21 than any other group and it would appear on that common sense basis, Your Honor—

Judge Bell: —Well, the Georgia Law says use the voters' list. This happens to be one of the counties where just about everybody of both races are registered to vote, so they started out with the jury list and they worked it out in a very fair way, as near as I can tell, unless there is something wrong in one of these categories that they eliminated. They started out with 79 people that they eliminated because they were under 21 years of age. Now, what could be wrong with that? That could be White or Negro. 93 people dead. Death is no respecter of race, as far as I know, so you couldn't make anything out of that. Poor health and overage. Well, if they are over 65 years of age they are automatically eliminated, so there couldn't be anything wrong with that.

Now, poor health is another thing. Now, you could have something wrong about that. Now, 514 who maintain Taliaferro County as a permanent place but most of the [160] time away from the county. I imagine that has more White than Negroes in it. I don't know that. The next is persons who requested to be eliminated from consideration was 48 and only one was a Negro. You could not complain about that. The next one is about persons whom information could not be obtained 225. Now, there could be something wrong about that. We don't know it. Before the Court would even look at it you would have to show that there were a good many Negroes in that group. Now, there is only 110 names where they applied this intelligence standard out of the whole list. Names on the voters list more than once was 33. But it turned out that there were 608 names left, and then they took those names and put them in alphabetical order and took every other name on the list. Now, I don't know how many were White or how many were Negroes on that list of 698 names. That could have something to do with it and it could not, and then they drew by lot to get the grand jury list.

Mr. Moore: But, Your Honor, you don't stop there, under the State Law, you have to go and look and see if there are any identifiable groups.

Judge Bell: Oh, well, there are two identifiable groups in Taliaferro County. You have been to Taliaferro County just like I have. There are White people and Negro people. They haven't got any Labor Unions, blue collar, white collar, or anything like that. They haven't got any Jewish groups or Italian groups or [161] Polish groups.

Mr. Moore: But if you take that voters list, if you use that voters list, it doesn't reflect a true cross section of the people that are eligible. You have got to go out and look around, and under the proof the majority of the people of Taliaferro County that qualifies above the age 21 are Negroes.

Judge Bell: Well, I don't know about that. There are 225 people that can't be found, and 33 on the list twice.

Mr. Moore: That's on the voters list. We are talking about the Census Tract.

Judge Bell: Well, I tell you when you get down to a final result with 113 Negroes and 191 White that is getting pretty close. It wouldn't take but a switch of 40 people to make it 50-50.

Mr. Moore: But it just doesn't work out, Your Honor. The Commissioners are all white.

Judge Morgan: Well, don't you think a lot of that can be remedied at the ballot box?

Mr. Moore: No, sir, Your Honor. As long as we have got these procedures we are going to have this type of squabbling.

Judge Morgan: Well, you have got a majority on the voters list, 50-50, or a slight majority.

Mr. Moore: As long as we have these procedures, it doesn't matter what type of voting rights they apparently have, they will come out with the short end of the stick, having an [162] all black school system with no black representation in the administration and policy making and—

Judge Bell: —Mr. Moore, let me tell you about the school system, so you won't keep arguing about that.

Nobody has done anything about the school system, except you brought a suit to get the school system integrated and then what happened? The white people left. Now, that is all that has happened about that. There is not anything under the table or crooked or anything like that. The white people just left. That is all there is to that. You brought the suit, didn't you, or was it the Department of Justice that brought it?

Mr. Moore: This is not a casual thing, Your Honor, that the white people left. There is some obligation to stabilize the situation under the school board.

Judge Bell: Well, they have tried to get another county to take them, so it would be stabilized, but they couldn't get that done.

Mr. Moore: I don't recall that being in the Receiver's Report.

Judge Bell: The Receiver reported it to me and that is the reason I asked Mrs. Williams if it was true in order to get it in the record and it is now in the record.

Mr. Moore: But that was outside of his report.

Judge Bell: Well, it wasn't part of his report, but [163] it appeared obvious that there wasn't going to be no more Negroes in the school system I asked him to make some effort to get it merged with another county so we wouldn't have that result. Well, he came back and told me that he couldn't do it, and so I now have it in the record by having Mrs. Williams to testify about it.

Mr. Bloch: I just want to call attention to this report that I filed, the last three items in the summary, the percentages.

Judge Bell: Yes.

Mr. Bloch: Those were not given to me by the Jury Commissioners. I figured those out myself for the benefit of myself and the Court. 37 percent, 26 per cent and 28 per cent.

Judge Bell: All right.

Mr. Bloch: That was not furnished to me and was no part of their work. I just wanted to see how it worked and for the benefit of the Court.

Judge Bell: Well, I think when we get this other data about these groups—

Mr. Bloch: —We will get up that.

Judge Bell: —It will fall in place, so we will just wait and see about that.

Mr. Bloch: All right.

Judge Bell: Anything else, Mr. Moore?

Mr. Moore: No sir.

[164] Judge Bell: Anything, Mr. Evans?

Mr. Evans: No sir, I submitted a brief.

Judge Bell: All right, the Court will take the case under advisement, pending receipt of all of these extra documents and what-not that we are supposed to receive.

Mr. Bloch: We will get it just as quick as we can, but it is going to take some time to get the breakdown on those figures.

Judge Bell: We know it will. You will have a reasonable time.

Mr. Bloch: Thank you.

Judge Bell: All right, Court is adjourned.

The Marshall: Court is adjourned.

Opinion and Order

Before BELL, *Circuit Judge* and SCARLETT and MORGAN,
District Judges.

PER CURIAM:

This case is quasi-sequential to *Turner v. Goolsby*, S.D. Ga., 1966, 255 F.Supp. 725, also a three-judge matter, and that case is referred to as background. See also *United States v. Jefferson County Board of Education*, 380 F.2d 385, dissenting opinion, p. 416, fn. 6. These decisions point to the fact that the Taliaferro County School system is desegregated to the extent that there is only one grammar school and one high school in the entire system but there are no white children attending the public school system.¹ On the other hand, the school board members are all of the white race. This set of circumstances led to the instant class action brought by a Negro school child and her father on behalf of all Negro residents of Taliaferro County, Georgia, similarly situated. Another father and his five school children were added later as parties plaintiff.

The thrust of the complaint is that the Negroes have no voice in school management and affairs in that there are no Negroes on the school board. It is contended that Art. VII, § V, ¶ I of the Constitution of the State of

¹ According to the evidence in the instant case, in the 1966-67 school term there were 458 Negro children in the system. There were 72 white children attending a private school in grades one through ten. Cf. the recent Supreme Court decisions involving the desegregation of small rural school systems in Virginia and Arkansas, respectively. *Green v. County School Board of New Kent County, Virginia*, 1968. — U.S. —, 88 S.Ct. —, 20 L.Ed. 3d 716; *Raney v. The Board of Education of the Gould School District*, 1968, 88 U.S. —, — S.Ct. —, 20 L.Ed.2d 727.

Georgia of 1945, Ga. Code Ann. § 2-6801, and Ga. Code Ann. §§ 32-902, 901.1, 903 and 905, all having to do with the election of county school boards by the grand jury, are unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment and under the Thirteenth Amendment, both facially and as applied by reason of the systematic and long continued exclusion of Negroes and non-freeholders as members of the Board of Education of Taliaferro County, Georgia, and on the selecting grand juries. The same contention is made with respect to the Georgia laws regarding the appointment of and service as jury commissioners. Ga. Code Ann. §§ 59-101 and 106 (Ga. Laws 1967, p. 251, Vol. 1). Here again unconstitutionality in application is asserted on the basis of systematic exclusion of members of the Negro race from service as jury commissioner. Unconstitutionality is claimed also by reason of the alleged uncertainty, indefiniteness, and vagueness of the standards set forth in each of the statutes.²

Complainants seek an order declaring the aforesaid Georgia Constitutional provision and statutes unconstitutional on their face and as applied, and they also pray for ancillary money damages in the amount of \$500,000 to compensate them for past deprivations and denials of federal rights. By amendment they pray for attorneys fees.

Defendants named in the complaint are the members of the Board of Education of Taliaferro County and the jury

² Another allegation is that the school board has deprived Negro school children of text books, facilities, laboratories, recreation facilities, teaching programs, bus transportation and other benefits to the extent that they are ill equipped to advance in the modern world and are mere peons in the hands of the white race. This allegation fails utterly for want of proof and will be eliminated from the case at this point.

commissioners of Taliaferro County. Additionally, three citizens of Taliaferro County were sued individually and in their capacity as grand jurors of Taliaferro County but they were dismissed by an order entered on January 30, 1968 granting a motion to dismiss for failure to state a claim against them upon which relief could be granted.

A three-judge District Court was convened under 28 USCA, §§ 2281 and 2284. The case was heard on January 23, 1968. The evidence indicated and the court announced then and now so finds that Negroes were being systematically excluded from the grand juries through token inclusion. Jurors were being selected by the jury commissioners from the voter registration lists as required by the Georgia statute, Ga. Code § 59-106, *supra*. The number of Negro and white voters in the county were substantially the same. It developed that there were 272 whites and 56 Negroes on the traverse jury list; 119 whites and only 11 Negroes on the grand jury list. It appeared also without contradiction that jury commissioners were all white and that the members of the Board of Education were all white. The grand jury situation was such that Negroes had little chance of appointment to the school board.

The hearing was adjourned and Charles J. Bloch, Esq., of counsel for the defendants, was directed by the court, pending the continued hearing, to familiarize the defendants with the provisions of law relating to the prohibition against systematically excluding Negroes from the jury system. The hearing was resumed on February 23, 1968 and Mr. Bloch reported to the court and introduced evidence to the effect that Honorable R. L. Stephens, Judge of the Superior Court of Taliaferro County, Georgia, had, by order dated January 26, 1968, discharged the grand jury and required that the jury lists, both traverse and

grand, be revised in light of the oral pronouncement by this court that the grand jury master list was illegally composed. The jury commissioners were directed by Judge Stephens to immediately recompose the jury lists. The following is from the report filed on behalf of the jury commissioners. This report was substantiated by the testimony of the chairman of the jury commissioners and stands uncontradicted.

"The Jury Commissioners met beginning on the Monday following the order, to wit, January 29, 1968. They had for their consideration the list of persons who were registered to vote in the last general election. That list contained a total of 2,152 names. We are advised that the Jury Commissioners considered each and every name in that list. When the Commissioners did not have any information with respect to a particular individual, they asked other people in the community about him or her. In particular, when they did not know about persons of the Negro race, they asked Negro people about them. In considering each and every name they eliminated the following numbers of names without regard to race for the following reasons:

| | |
|---|-----|
| Poor Health and over-age | 374 |
| Under 21 years of age | 79 |
| Dead | 93 |
| Persons who maintained Taliaferro County as a permanent place of residence but were most of the time away from the county | 514 |

| | |
|--|-----|
| Persons who requested to be eliminated from consideration | 48 |
| Persons about whom information could not be obtained | 225 |
| Persons of both the white and Negro race who were rejected by the Jury Commissioners as not conforming to the statutory qualifications for juries either because of their being unintelligent or because of their not being upright citizens | 178 |
| Names on voters list more than once | 33 |

"This left a total of 608 names. Since 608 names are more than the Jury Commissioners deemed to be needed in the traverse jury box, they arranged these 608 names in alphabetical order, and took every other name on the list alternately and placed those names on the traverse jury list. This left a total of 304 names, and only then did the Commissioners look to see how many of these 304 names were those of Negroes and how many were those of whites. They determined that 113 were Negroes and 191 were white.

"Their next task was to select not more than two-fifths of this traverse jury list for the grand jury list. They decided that the fairest system would be to draw names by lot. They drew a total of 121 names by lot and put those names on the grand jury list. Having done that, they looked to see how many were of the Negro race and how many of the white race. They ascertained that 44 were the names of Negroes and 77 were names of whites."

It developed that the jury commissioners were assisted by two Negro residents of the county in making the jury revision. The chairman of jury commissioners agreed that a Negro would be appointed as clerk or secretary to the commissioners until such time as a Negro or Negroes could be appointed to membership on the commission in order that the Negroes of the county, in the meantime, would have some representation in the operation of the jury system.

The court requested the chairman of the jury commissioners to designate by race those persons who were on the voter registration list and who were eliminated from jury service. That was done subsequent to the adjourned hearing with the following result: 71 of the under 21 group were Negroes; 191 of those in poor health were Negroes; 263 of the 533 who were away from Taliaferro County Negroes; 171 of the 178 disqualified were Negroes; while only 3 of the 43 persons who requested to be relieved from jury duty were of the Negro race. The other categories were unknown as to race.

After the new grand and traverse jury lists had been completed and after all the names had been put in the respective jury boxes, a new grand jury was drawn by Judge Stevens from the jury box by lot. A total of 32 grand jurors were drawn: 9 Negroes and 23 whites. The grand jury actually serving consisted of 23 grand jurors, 17 of whom were whites and 6 Negroes, the others having been excused by the court.

That grand jury convened on Friday, February 16, for the purpose of considering the regular business of the court and for the purpose of confirming or rejecting persons who had been selected by the Board of Education of Taliaferro County, Georgia, to succeed Horace E. Williams.

Jr. for a term to expire August 25, 1968, Mr. Williams having resigned, and to succeed Albert Drinkard, deceased, for a term to expire August 22, 1969. Casper Evans, Sr., a Negro, had been chosen by the Board of Education to serve until the next meeting of the grand jury, and Moore Pittman, who is of the white race, had been chosen by the Board of Education to succeed Albert Drinkard, deceased, for the term expiring August 23, 1969. These choices by the Board of Education were confirmed by the grand jury.

The court finds and concludes that the grand jury list, as revised, is not unconstitutional or illegal. The court finds and concludes that the constitutional provision and the statutes in question are not unconstitutional on their face or as applied. There is nothing in the constitutional provision or in the statutes which contemplates or permits the resulting systematic exclusion from the grand juries. The standards are not inadequate. The facts showed systematic exclusion in the administration of the grand jury system prior to the revision but this resulted from the administration of the system and not from the constitutional provision and statutes under attack. The court also concludes that the provision requiring that members of the school board be freeholders has not been shown to be an unconstitutional requirement. There was no evidence to indicate that such a qualification resulted in an invidious discrimination against any particular segment of the community, based on race or otherwise.

There is thus no merit in the three-judge District Court questions presented. There remain, however, two single judge questions. One is that of the systematic exclusion of Negroes from the grand juries. This is the question that stems from the manner in which the grand jury system was

administered. The court in its discretion will retain jurisdiction over this single judge question and grant such relief as indicated. *Turner v. Goolsby*, supra; and cf. *United States v. Georgia Public Service Commission*, 196², 371 U.S. 285, 83 S.Ct. 397, 9 L.Ed.2d 317, to the effect that a three-judge District Court may dispose of a case on a ground that would not have justified calling a three-judge court. The jury commissioners will be enjoined from systematically excluding Negroes from the grand jury system in Taliaferro County. Cf. *Billingsley v. Clayton*, 5 Cir., 1966, 359 F.2d 13.

The other single judge question concerns the prayer for damages. See 42 USCA, § 1983 on the question of damages. Defendants claim a Seventh Amendment right to jury trial if the question is to be considered and we hold that there is merit in this contention. *Dairy Queen, Inc. v. Wood*, 1962, 369 U.S. 469, 8 L.Ed.2d 44. In view of the cumbersome which would be involved in a three-judge District Court jury trial and that such is not contemplated by the three-judge District Court statute, 28 USCA, § 2284, we decline, in our discretion, to entertain the question of ancillary damages.

All other prayers for relief are denied including the prayer for attorneys fees. Costs will be taxed against the defendant school board members and jury commissioners and the costs shall be allowed to include the expenses of complainants in traveling to Brunswick, Georgia for the adjourned hearing to the extent that may be possible under costs statutes. The school board members are assessed on the basis that their conduct, in substantial measure, precipitated the suit.

Counsel for complainants may present an order enjoining the jury commissioners as aforesaid.

This 2nd day of August, 1968.

GRIFFIN B. BELL

United States Circuit Judge

LEWIS R. MORGAN

United States District Judge

FRANK SCARLETT

United States District Judge

Final Judgment

On the 15th day of November, 1967, a complaint was filed in the United States District Court for the Southern District of Georgia, Augusta Division, for injunctive relief, declaratory judgment, and ancillary damages, in the above-styled cause. Pursuant to the prayers of the complaint, a three-judge District Court was convened, consisting of the Honorable Griffin B. Bell, Circuit Judge, Honorable Frank M. Scarlett, resident District Judge, and Honorable Lewis R. Morgan, designated District Judge. This cause, having come on for hearing, and having been heard by the Court on the pleadings and proofs of the parties, oral argument of counsel, and briefs of the parties, the Court having entered its opinion, incorporating its findings of fact and conclusions of law, with respect thereto on August 5, 1968, and being advised in the premises.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED, as follows:

I

E. C. Moore, Guy F. Beazley, J. M. Taylor, L. T. Lunceford, Reuben H. Jones, and Clarence Griffith, Individually, and as Jury Commissioners of Taliaferro County, Georgia, and their successors in office, are hereby permanently restrained and enjoined from systematically excluding Negroes from the grand jury system in Taliaferro County, Georgia.

II

Article VIII, Section V, paragraph one of the Constitution of the State of Georgia of 1945, 2 Georgia Code An-

notated, Section 6801, 59 Ga. Code Annotated, Sections 101 and 106; and 32 Georgia Code Annotated, Sections 902, 902.1, 903, and 905 are not unconstitutional on their face or as applied. We decline, in our discretion, to entertain the question of ancillary damages.

III

All other prayers for relief including the prayer for attorneys fees and all motions of the plaintiffs and defendants, except the motion of defendants W. W. Fouche, Rastus Durham, and Elmo Bacon, sued herein individually and as representatives of the class of persons known as Grand Jurors of Taliaferro County, Georgia, which the Court hereinbefore granted, are denied.

IV

Costs, to the extent permitted by law, are assessed in favor of the plaintiffs, including the expenses of the complainants in traveling to Brunswick, Georgia, for the adjourned hearing, against the defendant members of the Board of Education of Taliaferro County, Georgia, and defendant members of the Jury Commission of Taliaferro County, Georgia.

This 18th day of September, 1968.

GRIFFIN B. BELL

United States Circuit Judge

LEWIS R. MORGAN

*United States Circuit Judge,
Then United States District Judge*

FRANK M. SCARLETT

Senior United States District Judge

Order of the Supreme Court of the United States

**IN THE
SUPREME COURT OF THE UNITED STATES**

February 25, 1969

In this case probable jurisdiction is noted and the case is placed on the summary calendar.



Supreme Court of the United States

No. 842 ---

, October Term, 19 68

Calvin Turner, et al.,

Appellants,

v.

W. W. Fouche, et al.

**APPEAL from the United States District Court
for the Southern District of Georgia.**

**The statement of jurisdiction in this case
having been submitted and considered by the Court,
probable jurisdiction is noted and the case is
placed on the summary calendar.**

February 24, 1969

FILE COPY

DEC 16 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~84~~

23

CALVIN TURNER, *et al.*,

Appellants,

—v.—

W. W. FOCHE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No.

CALVIN TURNER, *et al.*,

Appellants,

—v.—

W. W. FOUCHE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the court below is as yet unreported and is set forth in the appendix, p. 29, *infra*.

Jurisdiction

This is an action for injunctive and declaratory relief in which the jurisdiction of the district court was invoked under 28 U. S. C. §§1331(a), 1343(3)(4), 2201, 2202; 42 U. S. C. §§1981, 1983, 1988, 1994, 2000d and 2000e; and the Fifth, Ninth, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States. The complaint sought, *inter alia*, to enjoin the continued en-

forcement and operation of Georgia's constitutional and statutory scheme for the selection of jurors and members of county boards of education. A statutory three-judge court was convened pursuant to 28 U. S. C. §§2281, 2284.

An opinion and order finding "no merit in the three-judge district court questions presented" (*infra*, p. 36) was entered August 5, 1968 and a final judgment and decree entered on September 19, 1968 (*infra*, p. 38). Timely notice of appeal to this Court was filed in the court below on October 14, 1968. On December 2, 1968, Mr. Justice Black extended the time for filing a Jurisdictional Statement to and including February 8, 1969.

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1253 to review the judgment of the district court. That court was properly convened pursuant to 28 U. S. C. §2281 because the action seeks to restrain enforcement of state statutes and constitutional provisions on the ground that they violate the Federal Constitution. See e.g., *Idlewild Bon Voyage Liquor Corporation v. Epstein*, 370 U. S. 713 (1962).

Constitutional and Statutory Provisions Involved

The Georgia constitutional and statutory provisions involved in this litigation are the following: Article VIII, Section V, paragraph I, of the Georgia Constitution of 1945 (Title 2, Section 6801, Georgia Code Annotated); Sections 32-902, 32-902.1, 32-903, 32-905, 59-101, and 59-106 of Georgia Code Annotated. These enactments are set out in full in the appendix to this statement at pp. 40-45, *infra*.

This action also involves the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Questions Presented

1. Whether Georgia's restriction of service on juries to the "upright and intelligent" and on jury commissions to the "discreet" violates the Fourteenth Amendment where both provisions provide an "opportunity to discriminate" racially which has been "resorted to"?

2. Whether the Georgia system of selection of school board members violates the Thirteenth, Fourteenth and Fifteenth Amendments where Negroes constitute over sixty percent of the population, fifty percent of the electorate, and all of those attending public schools, but only a disproportionate minority of those who appoint board members?

3. Whether Georgia's restriction of service on ~~juries~~ ^{school boards} to freeholders violates the Fourteenth Amendment?

Statement

A. Introduction

Despite the fact that approximately 62% of the residents and 50% of the registered voters in Taliaferro County, Georgia are Negro (*infra*, pp. 31, 32)¹ (II-132)² and all of

¹ Citations to the transcript of the first hearing in the district court are as follows: (I-). Citations to the second hearing are shown as: (II-).

² According to Census of Population, 1960, Table 27, pp. 12-130, and Table 28, pp. 12-148, the population of the county is:

| | |
|-------|-------|
| White | 1,273 |
| Negro | 2,096 |

| | |
|-----------------|-----|
| White (over 21) | 877 |
| Negro (over 21) | 979 |

| | |
|-----------------|-------|
| White (over 18) | 917 |
| Negro (over 18) | 1,073 |

the teachers and children who attend public schools of the country are Negro (Admissions 8, 11), the five-man county school board never had a Negro member until one was appointed as a consequence of this litigation (I-15, 37; II-6, 7; Admissions 4, 5, 6). (School board members are selected by the county grand jury by a process described *infra*, p. 7.) The white children of the county fled the system several years ago to attend private schools or public schools in other counties as part of "an effort to avoid desegregating the school system of Taliaferro County." *Turner v. Goolsby*, 255 F. Supp. 724, 731 (S. D. Ga. 1965). The *Turner* opinion describes in detail the complicity of the board of education and school superintendent in "the expenditure of . . . public funds for transporting the white children to adjoining counties" (255 F. Supp. at 729) as well as their part in an alleged "conspiracy . . . to have secretly and covertly arranged for all the white children to leave the county for school in other counties . . ." (255 F. Supp. at 727-28). The district court in *Turner* attempted to halt these practices by taking control from the board and placing the system in receivership. The receivership, however, was terminated several months later without any of the white children returning, and they have still not returned to the system (Admission 8). None of the defendant board members themselves had children attending the public schools (Admission 7): both members with children sent them to schools in another county (I-83).

Negro parents believed that they were unable to alter continued operation of a segregated school system, and that the white school board was, at worst, hostile and, at best, unresponsive to the needs and desires of the students actually attending the schools (I-155). The experience of

Negro parents that the school board would not even listen to their opinions and grievances strengthened that belief (I-127). Repeated attempts by appellant Calvin Turner and members of the Voters League, a civic group, to appear at school board meetings were unsuccessful. The time of scheduled meetings could not be determined despite attempts to obtain information from the board chairman (I-125-6, 143). When reached by phone his attitude was brusque and unhelpful (I-151, 152). A registered letter sent to him went unanswered (I-125-6). A change in the time of regular board meetings went unpublicized, contrary to law (II-104).

One parent, Mrs. Mary Allen, was invited to visit her child's classroom by the Negro principal. After the white superintendent observed Mrs. Allen in class, the classroom teacher was told: "Miss Hadden, discontinue this class until the parents (sic) leave" (I-168). Mrs. Allen subsequently asked to be allowed to organize a parents-teachers association in order to "have some kind of communication with the teacher" (I-173). The principal of the high school informed her that this could not be done because the superintendent had refused permission (I-173). When a group of parents attempted to appeal that decision, and present other grievances to the board, the board abruptly adjourned its meeting without responding to any of the complaints. The course of the meeting was described at trial (I-177):

"Judge Bell: How long did you stay in there?

The Witness: About ten minutes.

Judge Bell: And then they moved that the meeting be adjourned?

The Witness: That's right, and put the heater out. They had the heater on and a gentleman put the heater

out and we walked out. He started putting the lights out too and we walked out and then they closed the door.

Judge Bell: Did they give you an answer at all as to your complaints?

The Witness: No answer.

Judge Bell: No answer?

The Witness: No, sir.

Judge Bell: Have you had one since then?

The Witness: No, sir."

Mrs. Allen stated her opinion of the school system as follows:

"You can't even talk with the teacher, and can't go and sit in the classroom and can't talk to the board, can't talk to anybody, nothing about your problems" (I-178).

Shortly after her experience with the school board she moved to another county for the benefit of her child. Her purpose in moving, she said, was "to get communication" (I-178).

B. Initiation of Litigation

On November 15, 1967, appellants, a registered Negro voter residing in Taliaferro County, his daughter, a student in the public schools of the county, and a Negro resident of the county who is not a freeholder brought this action against members of the board of education, jury commission and grand jury of the county. Appellants alleged that they, and others similarly situated, were denied rights guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution by the operation

of statutory and constitutional provisions of the State of Georgia which authorize an intertwined and multi-layered scheme for the selection of school board members and jurors. Appellants contended, *inter alia*, that: (1) they had been denied an opportunity to serve as grand and traverse jurors on account of race (complaint para. 11(d)); (2) because of the power vested in the grand jury to select school board members, they had been denied on account of race an opportunity to participate in the process of selecting the officials who administer the schools of the county (complaint, para. 11(a), (b)); and (3) they had been denied on account of their poverty, and the requirement that school board members be freeholders, the opportunity to actually serve as board members (complaint 11(b)). Because appellants sought injunctive relief restraining the enforcement of state statutes and constitutional provisions, a three judge court was empanelled pursuant to 28 U. S. C. §§2281, 2284.

C. The Selection of Jurors and Board Members

The challenged selection process for the grand jury and school board members begins when a judge of the Superior Court, elected by the voters of a six county circuit, appoints six jury commissioners from among the "discreet" members of the community (II-58; Ga. Code Ann., Tit. 59 §101). These commissioners, who for at least the last 50 years have always been white (Admissions 1, 2 and 3; I-35, 36), then compile a list from among registered voters who are "upright and intelligent citizens of the county" to serve as grand and traverse jurors (Ga. Code Ann. Tit. 59 §106; Art. VIII, §V, ¶I, Ga. Constitution; Ga. Code Ann.

Tit. 2 §6801). The grand jury drawn from this list selects "from the citizens of their . . . count[y], five freeholders, who shall constitute the county board of education" (Art. VII, §V, ¶I, Ga. Constitution; Ga. Code Ann., Tit. 32 §902). The operation of this system is statewide, except in those counties altering it "by local or special law conditioned upon approval by a majority of the qualified voters of the county voting in a referendum thereon" (Ga. Code Ann., Tit. 2 §6801).

At the first of two hearings in the district court, evidence was introduced showing that on the jury list most recently composed, 56 out of a total of 328 eligible traverse jurors (or 17%) were Negroes (I-118; Plaintiffs' Exhibit I) and 11 out of 130 on the grand jury list (or 8.5%) were Negroes. The district court concluded that systematic exclusion of Negroes was taking place and condemned the practice:

"We all know what systematic exclusion is, and when there is as many registered Negro voters in a county as whites and you have 130 to 11 on the grand jury, why that's systematic exclusion, and that will have to be corrected" (I-200).

The court adjourned the hearing after informing defendants of the court's power to enjoin racial discrimination if a remedy were not devised (I-200, 203).

At the second hearing defendants submitted a report describing a recomposition of the jury lists without first notifying counsel for appellants of its contents (II-9). 113 of the 304³ persons said to be on the new traverse jury list

³ Disqualifications left 608 names on the list. Since fewer were needed, the jury commission alphabetized the remaining names and discarded every other one reducing the final list to 304 persons.

were Negroes (37%) and 44 of 121 persons on the grand jury list were Negroes (36%). 32 persons were initially selected for the grand jury, of whom 9 (or 28%) were Negro. Of the 23 persons actually selected to serve on the grand jury, after 9 persons were excused, 6 (or 26%) were Negro (II-6). In composing these jury lists, defendants claimed they started with a roll of all the registered voters in the county, eliminated from consideration several classes of persons found to be ineligible, and finally arrived at a list of persons they deemed fully eligible to serve as jurors. 178 persons excluded were as not conforming to the statutory requirement that jurors be "upright and intelligent." 171, or 96%, of those excluded by the commissioners were Negro. The precise criteria used to define uprightness and intelligence if any, were undetermined⁴ (II-27-32).

At the first hearing Judge Bell remarked that the absence of Negroes on the board of education "simply will not do" and stated pointedly that it would be wise if the school board filled its vacancies with "two outstanding Negroes . . . if you don't want to do that we will know that on the 23rd [of February]" (I-201). Two vacancies existed on the school board at the time of the hearing. At the new grand jury's first meeting it confirmed the school board's appointment of one Negro and one white to fill the vacancies.⁵

⁴ For example, the Jury Commission Chairman testified that he did not know whether any persons were found to lack a sufficiently upright character because of having been convicted of a traffic violation (II-32).

⁵ The grand jury is authorized to appoint members to the board except in the case of vacancies occurring for reasons other than expiration of a term. Such appointments are to be made by the remaining school board members subject to ratification by the grand jury at its next meeting (Ga. Code Ann., Tit. 2 §6801). The vacancies existing at the time of trial were of the latter type.

The revision of the jury list and the filling of the school board vacancies, were both accomplished without public notice of any kind being posted and without "any effort to contact anybody or any parents in Taliaferro County" (II-24, 108). Appellant Turner testified that the Negro who had been selected under these conditions was unrepresentative of the Negro community (II-147, 151), and that if Negroes had been afforded an opportunity to choose, they would have selected someone far more qualified educationally, and otherwise, to serve (II-151):

"Mr. Casper Evans was taken from the lower bracket, the very lowest bracket of those persons who have attained a education" (II-153).*

D. Opinion of the District Court

On August 5, 1968, the district court entered its opinion. The court stated that "the thrust of the complaint is that Negroes have no voice in school management and affairs" (*infra*, p. 30) and it concluded that the reconstitution of the grand jury was adequate relief. The court upheld the validity of all the challenged state statutes and constitutional provisions and denied relief, other than the grant of a general injunction against the systematic exclusion of Negroes from grand juries. The court held that nothing in the contested statutes themselves "contemplates or permits . . . systematic exclusion from the grand juries" and it affirmed their constitutionality both on their face and as applied (*infra*, p. 35). The Court did refer to appellants'

* "I submit", said Mr. Turner, of the 72 year old man with a third grade education who was chosen, "that it is the community that he represents, and the people in that community . . . knew nothing about the election of Mr. Evans, and . . . this certainly wouldn't be the democratic process" (II-139, 147).

prayer that the system be placed in receivership "pending the selection of new county school board members on a constitutionally acceptable basis" (complaint, prayer 5). Appellants' contention that their rights to equal protection of the laws were violated by reason of the total exclusion of non-freeholders as members of the board of education of the county was rejected:

"[t]here was no evidence to indicate that such a qualification resulted in an invidious discrimination against any particular segment of the community, based on race or otherwise" (*infra*, p. 36).

Appellants filed timely notice of appeal to this Court on October 14, 1968.

The Questions Presented Are Substantial

I.

Ga. Code Ann., Tit. 59 §§101, 106 Are Unconstitutionally Vague and Discriminate Against Negroes by Permitting Their Arbitrary Exclusion From Service as Jury Commissioners and Jurors in Violation of the Fourteenth Amendment to the Constitution of the United States.

Challenges to racial discrimination in the selection of jurors have usually been mounted by persons indicted and convicted by juries from which Negroes were excluded. In recent years, numerous civil suits have been brought to require jury selection officials to eliminate race from the process of selection, e.g., *Mitchell v. Johnson*, 250 F. Supp. 117 (M. D. Ala. 1966). The present action not only seeks to enjoin racial jury selection but challenges the vague

selection statutes themselves, for it is plain that until the unlimited discretion placed in the hands of local officials by such statutes is confined by objective standards non-racial selection is unlikely.⁷ The Fifth Circuit has said: "It is this broad discretion located in a non-judicial office which provides the source of discrimination in the selection of juries."⁸ *Labat v. Bennett*, 365 F. 2d 698, 713 (5th

⁷ See Kuhn, "Jury Discrimination: The Next Phase," 41 U. S. C. Law Rev. 235, 266-82 (1968).

⁸ The following state statutes require jurors to be of a certain moral character:

Alabama Code Tit. 30 §21 (1959): "all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment. . . ."

Arizona Rev. Stat. Ann. (1956) §21-201: ". . . sober and intelligent, of sound mind and good moral character. . . ."

Arkansas Stat. Ann. (1962): §39-101 Grand Juror: ". . . temperate and of good character. . . ." §39-206 Other Jurors: "persons of good character, of approved integrity, sound judgment and reasonably informed. . . ." See also §39-208: same as 206 and applies to grand jurors.

Connecticut Gen. Stat. Ann. (Supp. 1965): §51-217: ". . . esteemed in their community as persons of good character, approved integrity, sound judgment and fair education. . . ."

Florida Stat. Ann. (1961) Tit. 5 §40.01: "law abiding citizens of approved integrity, good character, sound judgment and intelligence. . . ."

Illinois Ann. Stat. (Smith-Hurd Supp. 1966) Tit. 78 §2: "of fair character, of approved integrity, of sound judgment, well-informed. . . ."

Iowa Code Ann. (1950) §601.1: "of good moral character, sound judgment. . . ."

Kansas Stat. Ann. (1964) §43-102: "possessed of fair character and approved integrity. . . ."

Louisiana Rev. Stat. Ann. (1950) §13-3041: "of well known good character and standing in the community. . . ."

Maine Rev. Stat. Ann. tit. 14 §1254 (Supp. 1965): "of good moral character, of approved integrity, of sound judgment and well-informed. . . ."

(footnote continued on next page)

Cir. en banc 1966); see also *Smith v. Texas*, 311 U. S. 128 (1940); *Rabinowitz v. United States*, 366 F. 2d 34 (5th Cir. en banc 1966).

Recently in *Whitus v. Georgia*, 385 U. S. 545, 552 (1967) and *Bostick v. South Carolina*, 386 U. S. 479 (1967) this Court condemned statutes which injected race into the selection of jurymen because they provided an "opportunity to discriminate." The vague and subjective intelligence and character standards challenged here provide a similar "opportunity to discriminate," an opportunity which was employed by selection officials, both before and after this litigation was commenced. Although the number of white and Negro voters in the county were substantially the same, only 11 of 130 of those on the grand

Maryland Ann. Code Art. 51 (Supp. 1966) §9: "with special reference to the intelligence, sobriety and integrity of such persons."

Michigan Stat. Ann. (Supp. 1965) §27A.1202: "of good character, of approved integrity, of sound judgment, well informed."

Missouri Ann. Stat. (Supp. 1966) §494.010: "sober and intelligent, of good reputation".

Nebraska Rev. Stat. (1964) §25-1601: "intelligent, of fair character, of approved integrity, well informed".

New York Judic. Law (Supp. 1966) §504(5): "of good character, of approved integrity, of sound judgment".

North Carolina Gen. Stat. (1953) §9-1: "of good moral character and have sufficient intelligence to serve".

Oklahoma Stat. Ann. tit. 38 (Supp. 1966) §28: "of sound mind and discretion, of good moral character".

South Carolina Code Ann. (1962) §38-52: "of good moral character".

Texas Rev. Civ. Stat. Ann. (1964) §2133: "of sound mind and good moral character".

West Virginia Code Ann. (1966) §52-1-4: "of sound judgment, of good moral character".

Wisconsin Stat. Ann. (1957) §255.01(5): "esteemed in their communities as of good character and sound judgment".

jury list were Negro until suit was filed (*infra*, p. 32). During the recomposition process, 96% of the persons found by the jury commissioners not to be "upright and intelligent citizens" were Negro. All the "discreet" persons selected to be jury commissioners over a period of 50 years have been white. It is apparent that the inherent vagueness of the provisions involved at the very least serve as a convenient mask for discrimination.

Georgia law creates two levels at which virtually unlimited discretion is delegated to persons possessing appointive powers. First, the discretion of the judge of the Superior Court is such that he can disqualify from eligibility for the office of jury commissioner anyone he deems not to be "discreet" (Ga. Code Ann., Tit. 59 §101). Second, the discretion of the jury commissioners is such that they may disqualify from eligibility for service as jurors anyone they find not to be an "upright and intelligent citizen" (Ga. Code Ann., Tit. 59 §106). Section 106 further provides that if at any time "*it appears to the jury commissioners*" that the jury list is not a fairly representative cross-section of the "upright and intelligent citizens" of the county, they shall supplement the list by "going out into the county and personally acquainting themselves with other citizens of the county, including upright and intelligent citizens of any significantly identifiable group in the county which may not be fairly represented thereon." (Emphasis supplied.) Thus the statute first provides the jury commissioners with "the opportunity to discriminate," then charges the very same persons with the power to determine subjectively whether in fact the opportunity "was resorted to" (*Whitus, supra*, 385 U. S. 552) and should be remedied.

It is settled, however, that when constitutional rights are involved officials may not exercise a discretion which consists solely of their own judgment unguided by statutory or other guidelines. In other spheres of governmental activity this Court has declared similar language permitting public officials to make subjective decisions unconstitutional vague: "unreasonable charges" *United States v. L. Cohen Grocery Co.*, 255 U. S. 81 (1921); "unreasonable profits" *Cline v. Frink Dairy Co.*, 274 U. S. 445 (1927); "reasonable time" *Herndon v. Lowry*, 301 U. S. 242 (1937); "sacrilegious" *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952); "so massed as to become vehicles for excitement" (a limiting interpretation of "indecent or obscene") *Winters v. New York*, 333 U. S. 507 (1948); "immoral" *Commercial Pictures Corp. v. Regents of University of New York* reported with *Superior Films, Inc. v. Department of Education*, 346 U. S. 587 (1954); "an act likely to produce violence" in *Edwards v. South Carolina*, 373 U. S. 229 (1963); "subversive person" in *Baggett v. Bullitt*, 377 U. S. 360 (1964); "reprehensive in some respect"; "improper"; and outrageous to "morality and justice" *Giaccio v. Pennsylvania*, 383 U. S. 339 (1966). See also *Staub v. City of Baxley*, 355 U. S. 313 (1958); *South Carolina v. Katzenbach*, 383 U. S. 301, 312, 313 (1966);⁹ *Louisiana v. United States*, 380 U. S. 145, 153 (1965); see also *United States v. Atkins*, 323 F. 2d 733, 742-743 (5th Cir. 1963); *Davis v. Schnell*, 81 F. Supp. 872 (S. D. Ala.)

⁹ Dealing with voting qualifications imposed by South Carolina Law similar to those of Sections 101 and 106, the Court declared in *Katzenbach*, 383 U. S. at 312-313:

"... the good morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials."

aff'd per curiam, 336 U. S. 933 (1949); *Board of Supervisors v. Ludley*, 252 F. 2d, 372, 74 (5th Cir. 1958).

Requirements of specificity are at least as necessary in a selection system for jurors because "exclusion from jury service is at war without basic concepts of a democratic society." *Smith v. Texas*, 311 U. S. 128, 130 (1940) and because, as is true with racial discrimination in voting¹⁰ (an analogy especially pertinent here in light of the dual role of the grand jury system), excessive discretion in the hands of local officials thwarts nonracial selection. *Smith v. Texas*, *supra*; *Labat v. Bennett*, *supra*, at 365 F. 2d 712, 713. Furthermore, while injunctions against racial selection methods may be sufficient to prevent blatant acts of discriminatory exclusion, more subtle forms of the practice survive and will continue to survive as long as such tools remain available. At the first hearing of this cause, the lower court, in effect, ordered recomposition of Taliaferro County jury list on a non-discriminatory basis. While the result was an increase in Negro selection, an overwhelming proportion of those excluded as not "upright and intelligent citizens" were Negro. Thus, under the existing statutory scheme it may well be possible to eliminate the total exclusion but not the racial limitation of Negroes from the jury rolls. It is not, however, only exclusion but limitation on the basis of race which the Constitution prohibits: "Discriminations against a race by barring or limiting citizens of that race from participation in jury service are odious to our thought and our Constitution" (emphasis added). *Brown v. Allen*, 344

¹⁰ Condemnation of discretion in the hands of state voting officials is the heart of two recent decisions of the Court. See *United States v. Mississippi*, 380 U. S. 128 (1965) and *Louisiana v. United States*, 380 U. S. 145 (1965).

U. S. 433, 470-471 (1953) citing *Brunson v. North Carolina*, 333 U. S. 851 (1948); *Cassell v. Texas*, 339 U. S. 282, 286, 287 (1950).¹¹

It may well be that the jury commissioners in this county truly believe that of all the registered voters who are by reason of faulty intelligence or character ineligible to serve as jurors, 96% are Negroes. They cannot be enjoined from that belief. It is possible, however, for them to be prohibited from bringing such opinions, similar to those branded a "violent presumption" in *Neal v. Delaware*, 103 U. S. 370, 397 (1881), to bear upon decisions as to who should be selected as jurors. As was true in *Louisiana v. United States*, "the vice cannot be cured by an injunction enjoining its unfair application" 380 U. S. 145, 150 n. 9 (1965), but only by prohibiting the use of a vague and subjective standard.

¹¹ That an unconstitutional limitation of Negroes has taken place in Taliaferro County is shown by the fact that in compiling a new list of jurors, the jury commissioners had 304 names (113 Negroes or 37%; 191 whites or 63%) remaining after randomly discarding half the registered voters not disqualified. One of the statutory standards of disqualification, the character test, in effect, operated to exclude Negroes only: Of the 178 persons excluded, 171 were Negro, 7 were white. Thus prior to application of the character test there was approximately a 50-50 percentage breakdown reflected on the lists if we assume, as is likely, that the random number discarded merely halved the numbers of the whites and Negroes on the initial list. As of all those disqualified by the test, 96% were Negro, the result of the test's application was to reduce the Negro representation on the revised list from approximately 50% (the proportion of Negro voters) to 37%.

II.

Georgia Constitutional and Statutory Provisions for Selection of School Board Members Operate in Taliaferro County to Exclude Negroes From Participation in the Selection of Board Members in Violation of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States.

Although Negroes constitute about 60% of the residents and 50% of the registered voters in Taliaferro County, they long have been virtually excluded from jury service. Because the county grand jury appoints members of the school board, Negroes were also excluded from membership although since 1965, the public schools have been attended and staffed solely by Negroes, county whites sending their children to private school or to other counties to avoid desegregation. After a hearing in the district court established blatant disregard of Negroes' constitutional rights, the jury commissioners recomposed the jury list as follows:

| | |
|-------------------|-----|
| 113 Negroes | 37% |
| 191 whites | 63% |

A new grand jury was chosen from this list composed of:

| | |
|-----------------|-----|
| 6 Negroes | 26% |
| 17 whites | 74% |

The new grand jury then selected one Negro and one white to fill two vacancies on the board of education leaving the board with four whites and, for the first time in at least 50 years, a Negro.

Appellants contend in section I, *supra*, that the jury list, as revised, violates the Fourteenth Amendment because it was revised pursuant to unconstitutionally vague state constitutional and statutory provisions which provide an opportunity to discriminate on the basis of race. But regardless of whether appellants' contentions with respect to the vagueness of Georgia jury selection statutes are correct, the system of selecting grand jurors in Taliaferro County must fall for the reason that the grand jury plays the essentially political role of selecting school board members. In short, even if equality of representation of the races may not be required in selecting eligible jurors, stricter requirements of fair representation apply here: "the theme of the Constitution is equality among citizens in the exercise of their political rights." *MacDougall v. Green*, 335 U. S. 281, 290 (1948) (Mr. Justice Douglas dissenting) cited with approval in *Reynolds v. Sims*, 377 U. S. 533, 564 fn. 41 (1964).

While the particular system of selection of board members involved does not provide for direct election, that fact does not diminish the rights of Negroes to be afforded full and equal participation in it. *Sailors v. Board of Education of Kent County*, 387 U. S. 105 (1967) illustrates the principle that the right of states to regulate their political subdivisions may in no instance validate racial discrimination. There a system for selection of school board officials was held not subject to "one man, one vote" requirements, the latter being held to be subordinate to the right of states to use appointive, non-representative methods, for the choosing of administrative officials. But this Court was careful to distinguish racial discrimination in the political process from the *Sailors* holding (387 U. S. at 108-109):

"A State cannot, of course, manipulate its political subdivisions so as to defeat a federally protected right, as for example, by realigning political subdivisions so as to deny a person his vote because of race. [footnote omitted] *Gomillion v. Lightfoot*, 364 U. S. 339, 345."

Certainly this exception to the *Sailors* rule prohibits state action to dilute the influence of Negroes in the class of citizens choosing, appointing or electing members of a political body. It can hardly be argued that the policy of the Thirteenth, Fourteenth, and Fifteenth Amendments contemplates permissible exclusions of Negroes from a political process merely because the particular form of selection involved is not a general election. The primary purpose of those Amendments, recognized in numerous decisions of this Court,¹² is to undo the effects of slavery upon the civil rights of the Negro race. That purpose is subverted by permitting exclusion of Negroes from any political process, whether or not a regular election. Mr. Justice Black, concurring, stated the essential nature of the prohibited evil in *Terry v. Adams*, where the scheme invalidated stripped "Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens," 345 U. S. 461, 470 (1953). *Terry* voided the "pre-primary endorsement elections of a privately run organization on the ground that since that endorsement virtually assured eventual election of the person supported, the state could not permit the exclusion of Negroes from the endorsement vote. Such exclusion was disallowed, even though not tak-

¹² See *Shelley v. Kraemer*, 334 U. S. 1, 23 (1948) and cases cited in footnote 30, *Nixon v. Condon*, 286 U. S. 73, 89 (1932), *Nixon v. Herndon*, 273 U. S. 536, 540-541 (1927).

ing place at a general or even primary election, simply because its real effect was that described by Mr. Justice Black.

In Taliaferro County, the method for selection of board members prevents the Negro community from effectively influencing the choice of officials whose decisions critically affect the lives of themselves and their children. While constituting one half of the voters of the county, and all of the school children, the effect of the system of selection is to render them a minority of those who select board members. In *Reynolds v. Sims*, *supra*, this Court stated that "since the right to franchise in a free and unimpaired manner is *preservative of other basic civil and political rights*, any alleged infringement of the right to vote must be carefully and meticulously scrutinized." 377 U. S. at 562 (emphasis added). The "basic civil and political rights" of Negroes in Taliaferro County, in particular their right to a school system undiluted by segregation or control by those who have no interest in educational quality, are jeopardized by infringement of their power to select school officials. The evil is not diminished because *all* Negroes have not been precluded from participation in the selection process. "(D)ilution of Negro voting power . . . is just as discriminatory as complete disfranchisement or total segregation." *Sims v. Baggett*, 247 F. Supp. 96, 109 (M. D. Ala. 1965); to the same effect see also *Smith v. Paris*, 257 F. Supp. 901 (M. D. Ala., N. D. 1966) *aff'd* and modified as to collateral matter, 386 F. 2d 979 (5th Cir. 1967).¹³

¹³ The *Sailors* rule does not negate the relevance of all aspects of reapportionment law for that case implied what *Sims v. Baggett*, *supra*, states explicitly that "the Constitution itself requires a distinction between . . . political . . . gerrymandering and gerry-

Nor is the injury to appellants lessened by the fact that a Negro was finally put on the school board after the first hearing in this cause. There is no evidence that the person selected was anything but a token appointment by the grand jury under pressure of this action. Appellant Turner testified that the individual selected is not representative of the Negro community. In any case, the essence of appellants' claim is that they, and the class they represent, are limited in their power of *choosing* board members; that claim is in no way weakened by the fact that the school board *might* have appointed someone who also *might* have been chosen if the Negro community had the electoral power to which it is entitled. To paraphrase *Gomillion v. Lightfoot*, 364 U. S. 339 (1960) the inescapable effect of this long established scheme is to despoil Negro citizens, and only them, of their right to participate meaningfully in the selection of school board members.

Where Negroes have been deprived of their political rights the remedy has been invalidation of the discriminatory features of the system, e.g., *Lane v. Wilson*, 307 U. S. 268 (1939); *Smith v. Allwright*, 321 U. S. 649 (1944). Where a vague delegation of power has been the mechanism involved, the delegation has been abolished, *Louisiana v. U. S.*, *supra*. In addition to such relief, appellants also sought appointment of a receiver to operate the school system until a constitutional system selecting board members could be instituted. The district court erred funda-

mandering for the purpose of racial discrimination" (247 F. Supp. at 105). For the view that *all* civil rights of Negroes are in a distinct position in the protective scheme of the Fourteenth Amendment, see cases cited in footnote 12, *supra*; *Slaughter House Cases*, 83 U. S. 36, 81 (1873); *Harper v. Virginia Board of Elections*, 383 U. S. 663, 682 dissenting opinion of Mr. Justice Harlan n. 3 (1966).

mentally in not adopting one of the available remedies which would eliminate diminution of Negro political rights.

In this case the deprivation of political power through the layers of discretion authorized by the statutory selection scheme powerfully affects "matters that intimately touch the daily lives of citizens," *Terry, supra*. The proper education of their children has been recognized time and again as of crucial importance to the Negro race since *Brown v. Board of Education*, 347 U. S. 483 (1954). That interest cannot be adequately protected within the context of an administrative structure which is subject to total domination by the white community, a community which has continually and consistently shown itself hostile to the interests and rights of Negroes. Only three years ago white resistance to integration of the schools was so great as to necessitate a federal court to order placement of the system in receivership. Since the termination of that takeover no change in white community sentiment has been manifested. There is no evidence in the record of any significant attempt by that community, or its school board, to reverse the exodus of white students from the public schools. The school board refuses to even listen to the grievances of the Negro parents whose children do attend the schools. In such circumstances, the Georgia scheme for selecting school board members operates in this county to deprive appellants of rights guaranteed by the Constitution.

III.

The State's Restriction of Membership on County Boards of Education to Freeholders Violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment commands that distinctions drawn by a state—whether in the exaction of pains or in the allowance of benefits—must not be irrelevant, arbitrary, or invidious. Where a state chooses to grant an advantage to one class and not to others “[t]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the action in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.” *Gulf, Colorado and Santa Fe Ry. v. Ellis*, 165 U. S. 150, 155, 159 (1897). See e.g., *Skinner v. Oklahoma*, 316 U. S. 535 (1942); *Baxstrom v. Herold*, 383 U. S. 107 (1966). Georgia’s constitutional and statutory limitation on the right to serve as a school board member to “five freeholders” (Ga. Code Ann. Tit. 2, §6801; Tit. 32, §902) is clearly in violation of these requirements for such a limitation is palpably arbitrary and wholly irrelevant to the achievement of any legitimate state objective. The Georgia property test is as irrational standard for membership on a county school board as was the poll-tax as a test of voting qualifications, *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966).

The court below did not conclude that the freeholder requirement bore a reasonable relationship to any legitimate incident of school board membership. In sustaining the freehold qualification, the court held only that there was

no showing th 25
any particular

There was no property barrier discriminated against
of the community:

any partice to indicate that such a qualifi-
race or an invidious discrimination against
ment of the community, based on

Appellants (*infra*, p. 36).

able. Numer

Wainwright that such a holding is unsupport-

U. S. 12 (1963) of this Court, e.g., *Gideon v.*

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challenge a is holding it should not be understood

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plaintiff father of five school children

¹⁵ Although only possessed requisite standing to

to choose off prohibited him from serving on the

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399, 401-402 extension applied only to the right

that the right to seek office can also

s of invidious discriminations. *Bond*

66); *Anderson v. Martin*, 375 U. S.

property. In *Pierce v. Ossining*, — F. Supp. — (No. 68 Civ. 4150, S. D. N. Y., decided Nov. 1, 1968), the property requirement struck down was a prerequisite to voting in a town election, and in *Landes v. Town of Hempstead*, 231 N. E. 2d 120, 20 N. Y. 2d 417 (1967), the New York Court of Appeals rejected a property requirement as a limitation on the right to hold office. These decisions rely upon the clear import of *Harper* that statutory burdens on the poor are facially suspect and to be upheld only when the state demonstrates a compelling justification:

[L]ines drawn on the basis of wealth or property, like those of race (*Korematsu v. United States*, 323 U. S. 214, 216, 89 L. ed. 194, 198, 65 S. Ct. 193), are traditionally disfavored [citing *Edwards v. California*, 314 U. S. 160, 184-185 (1941); *Griffin, supra*; and *Douglas v. California*, 372 U. S. 353 (1963)] (383 U. S. at 668).

Even if distinctions based on wealth may at times be justified, the freeholder requirement involved here cannot withstand constitutional attack for it has no rational relationship to the duties of members of the board of education. It might, perhaps, be argued that real property owners have a special interest in, or competence with respect to, the collection of taxes which support the schools. Assuming, arguendo, that the state might broadly exclude all non-freeholders from board membership for such a reason, the Georgia restriction is not thereby sustainable. The board of education does not itself collect any school taxes, Ga. Code Ann. Tit. 32, §1127, or set tax rates. (The board may only *recommend* a school tax rate to the responsible county authorities, Ga. Code Ann. Tit. 32, §1118.) The property which is potentially subject to the tax is by no means limited to that of individual freeholders, for the

property of corporations, both real and personal, is subject to assessment for school purposes, Ga. Code Ann., Tit. 32, §1116. Moreover, the budget of the Taliaferro school system includes but a small proportion of funds raised by ad valorem taxes (\$39,000 out of a total of \$267,611.65). (Answers of Defendants Cranston Jones et al. to Interrogatories, answers 26 and 27.) The remainder of the school budget comes from a variety of state and federal sources. A further indication that school board members are so limited in their financial levying power as to make the freehold qualification without relevance to their powers and duties is the limit on school tax rates to be found in the Georgia Constitution, which restricts a county board to a levy of no greater than 20 mills per dollar of assessed value unless recourse is had to the voters of the county. Georgia Code Ann., Tit. 2 §7501; *Commissioners of Chatham County v. Savannah Electric and Power Company*, 112 S. E. 2d 665, 215 Ga. 636 (1960).

Appellants contend, therefore, that the court below erred in not finding as the New York Court of Appeals found for town government that "it is impossible . . . to find any rational connection between qualifications for administering [school] affairs and ownership of real property" *Landes v. Town of Hempstead*, 20 N. Y. 2d at 421. We emphasize that nothing appellants urge detracts in the least from the power of the states to assure that competent persons administer the public schools. In *Abington School District v. Schempp*, 374 U. S. 203 (1963) for example, this Court recognized the special stake parents have in the proper administration of their schools by granting them standing to contest unconstitutional practices taking place in them. Georgia law does not, however, recognize a group

with a special concern for the schools by limiting board members to freeholders; on the contrary, it vests membership in a group with no such special concern. Where an interest as vital as the operation and management of the schools is involved, a state violates the Equal Protection Clause by restricting control of its educational establishment to those who own a particular class of property.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted.

Respectfully submitted,

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with a special concern for the schools by having board members be trustees; on the contrary, it vests management in a group with no such special concern. When the interests vital to the operation and management of the schools are ignored, a state violates the Equal Protection Clause by vesting control of its educational establishment in those who own a particular class of property.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

APPENDIX

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APPENDIX**Opinion and Order**

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION
(Filed: August 5, 1968)
Civil Action No. 1357

CALVIN TURNER, *et al.*,

Plaintiffs,

—v.—

W. W. FOUCHE, *et al.*,

Defendants.

Before :

BELL, *Circuit Judge* and
SCARLETT and MORGAN, *District Judges.*

PER CURIAM :

This case is quasi-sequential to *Turner v. Goolsby*, S. D. Ga., 1966, 255 F. Supp. 724, also a three-judge matter, and that case is referred to as background. See also *United States v. Jefferson County Board of Education*, 380 F. 2d 385, dissenting opinion, p. 416, fn. 6. These decisions point to the fact that the Taliaferro County school system is de-segregated to the extent that there is only one grammar school and one high school in the entire system but there

are no white children attending the public school system.¹ On the other hand, the school board members are all of the white race. This set of circumstances led to the instant class action brought by a Negro school child and her father on behalf of all Negro residents of Taliaferro County, Georgia, similarly situated. Another father and his five school children were added later as parties plaintiff.

The thrust of the complaint is that the Negroes have no voice in school management and affairs in that there are no Negroes on the school board. It is contended that Art. III, § V, ¶ I of the Constitution of the State of Georgia of 1945, Ga. Code Ann., § 2-6801, and Ga. Code Ann., §§ 32-902, 902.1, 903 and 905, all having to do with the election of county school boards by the grand jury, are unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment and under the Thirteenth Amendment, both facially and as applied by reason of the systematic and long continued exclusion of Negroes and non-freeholders as members of the Board of Education of Taliaferro County, Georgia, and on the selecting grand juries. The same contention is made with respect to the Georgia laws regarding the appointment of and service as jury commissioners. Ga. Code Ann., § 59-101 and 106 (Ga. Laws 1967, p. 251, Vol. 1). Here again unconstitutionality in application is asserted on the basis of

¹ According to the evidence in the instant case, in the 1966-67 school term there were 458 Negro children in the system. There were 72 white children attending a private school in grades one through ten. Cf. the recent Supreme Court decisions involving the desegregation of small rural school systems in Virginia and Arkansas, respectively. *Green v. County School Board of New Kent County, Virginia*, 1968, — U. S. —, 88 S. Ct. —, 20 L. Ed. 2d 716; *Raney v. The Board of Education of the Gould School District*, 1968, 88 U. S. —, — S. Ct. —, 20 L. Ed. 2d 727.

systematic exclusion of members of the Negro race from service as jury commissioner. Unconstitutionality is claimed also by reason of the alleged uncertainty, indefiniteness, and vagueness of the standards set forth in each of the statutes.²

Complainants seek an order declaring the aforesaid Georgia Constitutional provision and statutes unconstitutional on their face and as applied, and they also pray for ancillary money damages in the amount of \$500,000 to compensate them for past deprivations and denials of federal rights. By amendment they pray for attorneys fees.

Defendants named in the complaint are the members of the Board of Education of Taliaferro County and the jury commissioners of Taliaferro County. Additionally, three citizens of Taliaferro County were sued individually and in their capacity as grand jurors of Taliaferro County but they were dismissed by an order entered on January 30, 1968 granting a motion to dismiss for failure to state a claim against them upon which relief could be granted.

A three-judge District Court was convened under 28 USCA, §§ 2281 and 2284. The case was heard on January 23, 1968. The evidence indicated and the court announced then and now so finds that Negroes were being systematically excluded from the grand juries through token inclusion. Jurors were being selected by the jury commissioners from the voter registration lists as required by the Georgia statute, Ga. Code § 59-106, *supra*. The num-

² Another allegation is that the school board has deprived Negro school children of text books, facilities, laboratories, recreation facilities, teaching programs, bus transportation and other benefits to the extent that they are ill equipped to advance in the modern world and are mere peons in the hands of the white race. This allegation fails utterly for want of proof and will be eliminated from the case at this point.

ber of Negro and white voters in the county were substantially the same. It developed that there were 272 whites and 56 Negroes on the traverse jury list; 119 whites and only 11 Negroes on the grand jury list. It appeared also without contradiction that jury commissioners were all white and that the members of the Board of Education were all white. The grand jury situation was such that Negroes had little chance of appointment to the school board.

The hearing was adjourned and Charles J. Bloch, Esq., of counsel for the defendants, was directed by the court, pending the continued hearing, to familiarize the defendants with the provisions of law relating to the prohibition against systematically excluding Negroes from the jury system. The hearing was resumed on February 23, 1968 and Mr. Bloch reported to the court and introduced evidence to the effect that Honorable R. L. Stephens, Judge of the Superior County of Taliaferro County, Georgia, had by order dated January 26, 1968, discharged the grand jury and required that the jury lists, both traverse and grand, be revised in light of the oral pronouncement by this court that the grand jury master list was illegally composed. The jury commissioners were directed by Judge Stephens to immediately recompose the jury lists. The following is from the report filed on behalf of the jury commissioners. This report was substantiated by the testimony of the chairman of the jury commissioners and stands uncontradicted.

"The Jury Commissioners met beginning on the Monday following the order, to wit, January 29, 1968. They had for their consideration the list of persons who were registered to vote in the last general election. That list contained a total of 2,152 names. We are advised that the Jury Commissioners considered each

and every name in that list. When the Commissioners did not have any information with respect to a particular individual, they asked other people in the community about him or her. In particular, when they did not know about persons of the Negro race, they asked Negro people about them. In considering each and every name they eliminated the following numbers of names without regard to race for the following reasons:

| | |
|--|-----|
| Poor Health and over-age | 374 |
| Under 21 years of age | 79 |
| Dead | 93 |
| Persons who maintained Taliaferro County as a permanent place of residence but were most of the time away from the county | 314 |
| Persons who requested to be eliminated from consideration | 48 |
| Persons about whom information could not be obtained | 225 |
| Persons of both the white and Negro race who were rejected by the Jury Commissioners as not conforming to the statutory qualifications for juries either because of their being unintelligent or because of their not being upright citizens | 178 |
| Names on voters lists more than once | 33 |

"This left a total of 608 names. Since 608 names are more than the Jury Commissioners deemed to be needed in the traverse jury box, they arranged these

608 names in alphabetical order, and took every other name on the list alternately and placed those names on the traverse jury list. This left a total of 304 names, and only then did the Commissioners look to see how many of these 304 names were those of Negroes and how many were those of whites. They determined that 113 were Negroes and 191 were white.

"Their next task was to select not more than two-fifths of this traverse jury list for the grand jury list. They decided that the fairest system would be to draw names by lot. They drew a total of 121 names by lot and put those names on the grand jury list. Having done that, they looked to see how many were of the Negro race and how many of the white race. They ascertained that 44 were the names of Negroes and 77 were names of whites."

It developed that the jury commissioners were assisted by two Negro residents of the county in making the jury revision. The chairman of jury commissioners agreed that a Negro would be appointed as clerk or secretary to the commissioners until such time as a Negro or Negroes could be appointed to membership on the commission in order that the Negroes of the county, in the meantime, would have some representation in the operation of the jury system.

The court requested the chairman of the jury commissioners to designate by race those persons who were on the voter registration list and who were eliminated from jury service. That was done subsequent to the adjourned hearing with the following result: 71 of the under 21 group were Negroes; 191 of those in poor health were Negroes; 263 of the 533 who were away from Taliaferro County were

Negroes; 171 of the 178 disqualified were Negroes; while only 3 of the 43 persons who requested to be relieved from jury duty were of the Negro race. The other categories were unknown as to race.

After the new grand and traverse jury lists had been completed and after all the names had been put in the respective jury boxes, a new grand jury was drawn by Judge Stevens from the jury box by lot. A total of 32 grand jurors were drawn: 9 Negroes and 23 whites. The grand jury actually serving consisted of 23 grand jurors, 17 of whom were whites and 6 Negroes, the others having been excused by the court.

That grand jury convened on Friday, February 16, for the purpose of considering the regular business of the court and for the purpose of confirming or rejecting persons who had been selected by the Board of Education of Taliaferro County, Georgia, to succeed Horace E. Williams, Jr. for a term to expire August 25, 1968, Mr. Williams having resigned, and to succeed Albert Drinkard, deceased, for a term to expire August 22, 1969. Casper Evans, Sr., a Negro, had been chosen by the Board of Education to serve until the next meeting of the grand jury, and Moore Pittman, who is of the white race, had been chosen by the Board of Education to succeed Albert Drinkard, deceased, for the term expiring August 23, 1969. These choices by the Board of Education were confirmed by the grand jury.

The court finds and concludes that the grand jury list, as revised, is not unconstitutional or illegal. The court finds and concludes that the constitutional provision and the statutes in question are not unconstitutional on their face or as applied. There is nothing in the constitutional provision or in the statutes which contemplates or permits the resulting systematic exclusion from the grand juries. The stand-

ards are not inadequate. The facts showed systematic exclusion in the administration of the grand jury system prior to the revision but this resulted from the administration of the system and not from the constitutional provision and statutes under attack. The court also concludes that the provision requiring that members of the school board be freeholders has not been shown to be an unconstitutional requirement. There was no evidence to indicate that such a qualification resulted in an invidious discrimination against any particular segment of the community, based on race or otherwise.

There is thus no merit in the three-judge District Court questions presented. There remain, however, two single judge questions. One is that of the systematic exclusion of Negroes from the grand juries. This is the question that stems from the manner in which the grand jury system was administered. The court in its discretion will retain jurisdiction over this single judge question and grant such relief as indicated. *Turner v. Goolsby*, supra; and cf. *United States v. Georgia Public Service Commission*, 1962, 371 U. S. 285, 83 S. Ct. 397, 9 L. Ed. 2d 317, to the effect that a three-judge District Court may dispose of a case on a ground that would not have justified calling a three-judge court. The jury commissioners will be enjoined from systematically excluding Negroes from the grand jury system in Taliaferro County. Cf. *Billingsley v. Clayton*, 5 Cir., 1966, 359 F. 2d 13.

The other single judge question concerns the prayer for damages. See 42 USCA § 1983 on the question of damages. Defendants claim a Seventh Amendment right to jury trial if the question is to be considered and we hold that there is merit in this contention. *Dairy Queen, Inc. v. Wood*, 1962, 369 U. S. 469, 8 L. Ed. 2d 44. In view of the cum-

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be involved in a three-judge
and that such is not contemplated
Court statute, 28 USCA, § 2284,
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of com relief are denied including the
adjour. Costs will be taxed against
the co: members and jury commission-
on thallowed to include the expenses
precip to Brunswick, Georgia for the

Content that may be possible under
the juwol board members are assessed

Thi nduct, in substantial measure,

may present an order enjoining
foresaid.

68.

/s/ GRIFFIN B. BELL
United States Circuit Judge

/s/ LEWIS R. MORGAN
United States District Judge

/s/ FRANK SCARLETT
United States District Judge

Final Judgment

(Filed: September 19, 1968)

On the 15th day of November, 1967, a complaint was filed in the United States District Court for the Southern District of Georgia, Augusta Division, for injunctive relief, declaratory judgment, and ancillary damages, in the above-styled cause. Pursuant to the prayers of the complaint, a three-judge District Court was convened, consisting of the Honorable Griffin B. Bell, Circuit Judge, Honorable Frank M. Scarlett, resident District Judge, and Honorable Lewis R. Morgan, designated District Judge. This cause, having come on for hearing, and having been heard by the Court on the pleadings and proofs of the parties, oral argument of counsel, and briefs of the parties, the Court having entered its opinion, incorporating its findings of fact and conclusions of law, with respect thereto on August 5, 1968, and being advised in the premises.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED, as follows:

I

E. C. Moore, Guy F. Beazley, J. M. Taylor, L. T. Lunceford, Reuben H. Jones, and Clarence Griffith, Individually, and as Jury Commissioners of Taliaferro County, Georgia, and their successors in office, are hereby permanently restrained and enjoined from systematically excluding Negroes from the grand jury system in Taliaferro County, Georgia.

II

Article VIII, Section V, paragraph one of the Constitution of the State of Georgia of 1945, 2 Georgia Code

Annotated, Section 6801, 59 Ga. Code Annotated, Sections 101 and 106; and 32 Georgia Code Annotated, Sections 902, 902.1, 903, and 905 are not unconstitutional on their face or as applied. We decline, in our discretion, to entertain the question of ancillary damages.

III

All other prayers for relief including the prayer for attorneys fees and all motions of the plaintiffs and defendants, except the motion of defendants W. W. Fouche, Rastus Durham, and Elmo Bacon, sued herein individually and as representatives of the class of persons known as Grand Jurors of Taliaferro County, Georgia, which the Court hereinbefore granted, are denied.

IV

Costs, to the extent permitted by law, are assessed in favor of the plaintiffs, including the expenses of the complainants in traveling to Brunswick, Georgia, for the adjourned hearing, against the defendant members of the Board of Education of Taliaferro County, Georgia, and defendant members of the Jury Commission of Taliaferro County, Georgia.

This day of September, 1968.

GRIFFIN B. BELL

United States Circuit Judge

LEWIS R. MORGAN

United States Circuit Judge,

Then United States District Judge

FRANK M. SCARLETT

Senior United States District Judge

Constitutional and Statutory Provisions Involved

1. Article VIII, Section V, paragraph I, of the Constitution of the State of Georgia of 1945:

"Establishment and maintenance; board of education; election, term, etc.—Authority is granted to counties to establish and maintain public schools within their limits. Each county, exclusive of any independent school system now in existence in a county, shall compose one school district and shall be confined to the control and management of a County Board of Education. The Grand Jury of each county shall select from the citizens of their respective counties five freeholders, who shall constitute the County Board of Education. Said members shall be elected for the term of five years except that the first election of Board members under this Constitution shall be for such term that will provide for the expiration of the term of one member of the County Board of Education each year. In case of a vacancy on said Board by death, resignation of a member, or from any other cause other than the expiration of such member's term of office, the Board shall by secret ballot elect his successor, who shall hold office until the next Grand Jury convenes at which time the said Grand Jury shall appoint the successor member of the Board for the unexpired term. The members of the County Board of Education of such county shall be selected from that portion of the county not embraced within the territory of an independent school district.

The General Assembly shall have authority to make provision for local trustees of each school in a county

system and confer authority upon them to make recommendations as to budgets and employment of teachers and other authorized employees."

2. Title 32 Georgia Code Annotated:

"(a) §902. *Membership in County boards.*—The grand jury of each county (except those counties which are under a local system) shall, from time to time, select from the citizens of their respective counties five freeholders, who shall constitute the county board of education. Said members shall be elected for the term of four years, and shall hold their offices until their successors are elected and qualified. Provided, however, that no publisher of schoolbooks, nor any agent for such publisher, nor any person who shall be pecuniarily interested in the sale of schoolbooks, shall be eligible for election as members of any board of education or as county superintendent of schools: Provided, further, that whenever there is in a portion of any county a local school system having a board of education of its own, and receiving its pro rata of the public school fund directly from the State Superintendent of Schools, and having no dealings whatever with the county board of education, then the members of the county board of education of such county shall be selected from that portion of the county not embraced within the territory covered by such local system." (Acts 1919, p. 320.)

"(b) §902.1. *Selection of board members by grand jury.*—The members of the county boards of education in those counties in which the grand jury selects

such members pursuant to Article VIII, Section V, Paragraph I of the Constitution of Georgia of 1945, as amended (Sec. 2-6801), shall be selected by the last grand jury immediately preceding the expiration of the term of the member that the member to be selected will replace." (Acts 1953, Nov. Sess., p. 334.)

"(c) §903. *Qualifications of members.*—The grand jury in selecting the members of the county board of education shall not select one of their own number then in session, nor shall they select any two of those selected from the same militia district or locality, nor shall they select any person who resides within the limits of a local school system operated independent of the county board of education, but shall apportion members of the board as far as practicable over the county; they shall elect men of good moral character, who shall have at least a fair knowledge of the elementary branches of an English education and be favorable to the common school system. Whenever a member of the board of education moves his residence into a militia district where another member of the board resides, or into a district or municipality that has an independent local school system, the member changing his residence shall immediately cease to be on the board and the vacancy shall be filled as required by law. Notwithstanding the foregoing provisions to the contrary, a county may provide by local law that two or more members of the board of education may be selected from the same militia district." (Acts 1919, pp. 288, 321; 1965, p. 124.)

"(d) §905. *Certificate of election; removal; vacancies.*—Whenever members of a county board are elected

or appointed, it shall be the duty of the clerk of the superior court to forward to the State Superintendent of Schools a certified statement of the facts, under the seal of the court, as evidence upon which to issue commissions. This statement must give the names of the members of the board chosen and state whom they succeed, whether the offices were vacated by resignation, death or otherwise. The evidence of the election of a county superintendent of schools shall be the certified statement of the secretary of the meeting of the board at which the election was held. Any member of a county board of education shall be removable by the judge of the superior court of the county, on the address of two-thirds of the grand jury, for inefficiency, incapacity, general neglect of duty, or malfeasance or corruption in office, after opportunity to answer charges; the judges of the superior courts shall have the power to fill vacancies, by appointment, in the county board of education for the counties composing their respective judicial circuits, until the next session of the grand juries in and for said counties, when said vacancies shall be filled by said grand juries." (Acts 1919, p. 322.)

3. Title 59 Georgia Code Annotated:

"(a) §101. *Jury commissioners; appointment; number; qualifications; terms; removal.*—There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall

be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor: Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners." (Acts 1878-9, p. 27; 1887, p. 52; 1901, p. 43; 1935, p. 151.)

"(b) §106. Immediately upon the passage of this Act and thereafter at least biennially, or, if the judge of the superior court shall direct, at least annually, on the first Monday in August, or within sixty (60) days thereafter, the board of jury commissioners shall compile and maintain and revise a jury list of upright and intelligent citizens of the county to serve as jurors. In composing such a list they shall select a fairly representative cross-section of the upright and intelligent citizens of the county from the official registered voters' list which was used in the last preceding general election. If at any time it appears to the jury commissioners that the jury list so composed, is not a fairly representative cross-section of the upright and intelligent citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including upright and intelligent citizens of any significantly identifiable group in the county which may not be fairly represented thereon.

"After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number, not exceeding two-fifths of the whole

number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

NO. 842

CALVIN TURNER, et al.,
Appellants,
v.
W. W. FOUCHE, et al.,
Appellees.

On Appeal from the United States District Court
for the Southern District of Georgia,
Augusta Division

MOTION TO DISMISS OR AFFIRM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the State of Georgia, an Appellee in the above styled proceeding, and pursuant to Rule 16 of this Honorable Court moves (1) that the appeal be dismissed for want of jurisdiction in that it is not one which falls within the scope of 28 U.S.C. § 1253, or, in the alternative (2) to affirm the judgment from

which the appeal was taken on the ground that the questions presented were fully explored and correctly decided below, and so unsubstantial as not to warrant further argument.

This _____ day of January, 1969.

ARTHUR K. BOLTON
Attorney General

ALFRED L. EVANS, JR.
Assistant Attorney General

J. LEE PERRY
Assistant Attorney General

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BRIEF IN SUPPORT OF MOTION TO
DISMISS OR AFFIRM

PART I

OPINION BELOW

The opinion of the United States District Court for the Southern District of Georgia, Augusta Division, which is as yet unreported, is correctly set forth at pp. 29-37 of the Appendix to Appellants' Jurisdictional Statement.

JURISDICTION

Appellants seek to obtain this Court's direct review of a decision of the United States District Court under 28 U.S.C. § 1253. For reasons which are fully set forth in the Argument portion of this brief, it is the position of the State of Georgia, an Appellee, that this Court's jurisdiction is not properly invoked under 28 U.S.C. § 1253 and that under this Court's decision in *Moody v. Flowers*, 387 U.S. 97 (1967) Appellants should have taken their appeal to the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

1. Whether the instant appeal falls within the scope of 28 U.S.C. § 1253 so as to confer direct appellate jurisdiction upon this Court rather than the United States Court of Appeals for the Fifth Circuit?

2. Whether the State statutes attacked by Appellants are so vague and ambiguous as to be violative of the Fourteenth Amendment?

3. Whether any issue of discrimination in connection with a State constitutional requirement that members of county boards of education be "freeholders" has been properly raised, and, if such issue has been properly raised, whether it presents a substantial federal question?

STATEMENT

Calvin Turner, aggrieved by the all-white composition of the 5 member County Board of Education of Taliaferro County, Georgia, brought this action for himself, his minor daughter and for other similarly sit-

uated voters and school children of that county. The gist of the complaint was his contention that the various defendants (i.e. the individual county jury commissioners, grand jurors and members of the county school board) were discriminating against Negro citizens in their county-level administration of those State laws which pertain to the appointment of county school board members, and that as a result Negro citizens were deprived of a voice in school management or affairs. The relationship of the three groups of named defendants lies in the fact that under a State constitutional provision and statutory enactments cited by Appellants (plaintiffs below) the county school board members are appointed by the county grand jury which is in turn selected by the county jury commissioners.

In addition to their main attack upon the allegedly improper administration of relevant State laws by defendant county officials, Appellants, in order to obtain a three-judge district court, injected averments that the enactments were also *facially unconstitutional*. A three-judge district court was convened and the State of Georgia was notified of the action pursuant to 28 U.S.C. § 2284 (2). Upon receipt of such notice the State promptly moved to intervene as a party defendant; for the limited purpose of asserting the validity of the attacked constitutional provision and statutes. The motion was granted by the three-judge court.

When the case came on for hearing on January 23, 1968, the State neither introduced evidence nor took part in argument respecting the propriety or impropriety of the county level administration of its statutes by Taliaferro County officials, this being left to the very

able counsel for defendant county officials. The State did urge that if discriminatory administration existed in Taliaferro County it was not only unauthorized by the statutes in question, but was indeed in violation of such State statutes, which in and of themselves were both non-discriminatory and constitutional.

Upon considering the evidence which was introduced, the court observed from the bench that Negroes in Taliaferro County did appear to be being systematically excluded from the county grand jury and consequently had little chance for appointment to the county board of education. The court subsequently adjourned the hearing after directing counsel for the defendant county officials to familiarize said defendants with the provisions of law relating to the prohibition against systematic exclusion of Negroes.

During the adjournment the Judge of the Superior Court of Taliaferro County, in accordance with the United States District Court's oral pronouncement, discharged the grand jury and directed a non-discriminatory recomposition of county jury lists, both traverse and grand. The jury commissioners secured the services of two Negro residents of the county and proceeded to complete the revision. When the new grand jury convened on February 16, 1968, it promptly filled one of the two existing vacancies on the county school board with a Negro citizen of Taliaferro County.

The hearing resumed on February 23, 1968, and evidence of the revised jury lists as well as the procedure under which the new lists were composed was presented in detail by the defendant county officials. Upon consideration of all of the evidence respecting revision of

the jury lists the United States District Court concluded that the same, *as revised*, were neither unconstitutional nor illegal. The court further concluded that the systematic exclusion in administration of the grand jury system prior to the court ordered revision was the result of *faulty administration* of the State constitutional provision and statutes *by local officials*, and not the result of any constitutional defect in the State enactments in and of themselves. In the words of the district court:

"There is no merit in the three-judge District Court questions presented."

In its final judgment the district court granted Appellants an injunction permanently restraining and enjoining the Jury Commissioner and their successors in office from systematically excluding Negroes from the grand jury system in Taliaferro County, but rejected Appellants' constitutional contentions respecting the statutes *per se*. The court declared instead that the attacked provisions were not unconstitutional. Appellants did not appeal to the United States Court of Appeals for the Fifth Circuit but have instead sought to obtain direct review by this Court pursuant to 28 U.S.C. § 1253.

PART II

ARGUMENT

1. **The appeal should be dismissed for want of jurisdiction in that it is not an appeal which falls within the scope of 28 U.S.C. § 1253.**

28 U.S.C. § 1253 provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an

interlocutory or permanent injunction in any civil action, suit or proceeding *required* by any Act of Congress to be heard and determined by a district court of three judges." (Italics added.)

In *Moody v. Flowers*, 387 U.S. 97, 101 (1967) this Court emphasized the fact that its jurisdiction to review decisions of United States district courts under this statute was limited to those situations where the action was *required* to be heard and determined by a three-judge court, and did not exist merely because a three-judge court had in fact been convened or rendered a decision. This is in harmony with the related principle that 28 U.S.C. § 2281 (providing for the convening of three-judge courts in certain specified cases) is to be strictly rather than liberally construed. See *Phillips, Governor of Oklahoma v. United States*, 312 U.S. 246, 251 (1941). In *Moody*, for example, the Court pointed out that a three-judge district court was not required in actions brought against local officials unless it was shown that said officials were performing the action complained of pursuant to some statewide law or policy (387 U.S. at pp. 101-102). Quite obviously the "statewide law or policy" exception is not to be permitted to swallow the general rule of inapplicability of 28 U.S.C. § 2281 to actions against county and other local officials by construing the exception to require nothing more than a showing that the local officials were acting under color of state law. To the contrary this Court, in *Ex Parte Bransford*, 310 U.S. 354, 361 (1940), clearly distinguished between those situations where the attack was in reality an attack upon improper administration of the statute (three-judge court *not* required) and those which in fact did amount to a substantial attack on the

statute itself (three-judge court required). In *Bransford* this Court further explained that the matter did not turn on what was alleged in the complaint and that the three-judge court requirement did not apply unless the action complained of *was directly attributable to the statute*, whether or not the statute was alleged to be unconstitutional.

The applicability of the foregoing legal precepts to the instant case is not difficult to discern. While Appellants did make the bald assertion below that a State constitutional provision (Art. VIII, Sec. V, Par. I; Ga. Code Ann. § 2-6801) and certain statutes (Ga. Code Ann. §§ 32-902, 32-902.1, 32-903, 32-905, 59-101 and 59-106) were *racially discriminatory on their face*, the emptiness of this contention is readily seen when one reads the statutes. Not only are they devoid of any mention of race (let alone any provision establishing a classification based upon race) but if anything, when taken together, they run in a direction exactly the opposite from that contended by Appellants. To illustrate, Appellants attack Georgia Laws 1967, page 251 (Ga. Code Ann. § 59-106) [which relates to the revision of jury lists and the selection of grand and traverse jurors] on the ground that it facially discriminates against them on racial grounds. Yet this very provision provides in part:

"If at any time it appears to the jury commissioners that the jury list so composed, is not a fairly representative cross-section of the upright and intelligent citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including upright and intelligent citizens of any significant identifiable group in

the county which may not be fairly represented thereon."

We think it borders on the absurd to say that a jury commissioner of Taliaferro or any other county who engages in racial discrimination in the selection of jurors is doing so "pursuant to statewide law or policy." See *Moody v. Flowers, supra*. He is to the contrary acting in flagrant violation of State law. This, of course, is not a three-judge court matter, *Query v. United States*, 316 U.S. 486, 490 (1942).

We think that examination of the constitutional provision and statutes in question shows quite clearly that the United States District Court for the Southern District of Georgia was entirely correct in concluding that Appellants' grievance was in fact one which was based entirely upon a wrongful administration of perfectly valid State statutes by local officials of Taliaferro County, and that in no instance could it reasonably be said that the wrongful administration by such county officials was directly attributable to the State statutes. The United States District Court was correct in its statement that there was no merit in the three-judge court questions, and, in accordance with *Moody v. Flowers, supra*, Appellants proper procedure was an appeal to the United States Court of Appeals for the Fifth Circuit and not an appeal to this Court under color of 28 U.S.C. § 1253.

2. The judgment of the United States District Court should be affirmed on the ground that it is manifest that the questions upon which the decision depends were fully explored and correctly answered below, and are so unsubstantial as not to warrant further argument.

(a) *The statutes in question are not susceptible to*

constitutional attack upon the ground that they are overly vague and ambiguous.

The State constitutional provision (Article VIII, Sec. V, Par. I of the Constitution of the State of Georgia of 1945, Ga. Code Ann. § 2-6801) and State statutes in question (i.e. Ga. Code Ann. §§ 32-902, 32-902.1, 32-903, 32-905, 59-101 and 59-106) are correctly set forth at pp. 40-45 of the Appendix to Appellants' Jurisdictional Statement.

It has already been pointed out that these provisions are devoid of any mention of race, much less creating discriminatory racial classifications, and that to the contrary they will, if correctly administered, be preventive of even unintentional discrimination. See Ga. Code Ann. § 59-106.

In addition to their rather absurd contention that the statutes are racially discriminatory on their face, however, Appellants also advance the argument that the statutes in question violate the Fourteenth Amendment in that they set forth standards and eligibility requirements which are overly vague and ambiguous. At the outset it may be questioned whether plaintiffs have standing to raise this question. The question of whether or not a statute is so completely unclear as to cause its application to violate the Constitution is ordinarily thought of as being a question of "due process." Yet it is obvious that the factual context in which this question is here raised is one which concerns an alleged wrongful denial of a political office existing pursuant to State law. In *Snowden v. Hughes*, 321 U.S. 1, 6-7 (1944) this Court pointed out that the right to hold *State* political office was derived solely from the relationship of the citizen

to his *State* as established by *State* law and hence could not be the basis of a complaint under either the privileges and immunities clause or under the "*due process*" clause of the Fourteenth Amendment. With respect to its rejection of that plaintiff's "due process" contentions the Court declared:

"More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of property or of liberty secured by the due process clause * * *. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion * * * as we reaffirm it now."

But it is in any event hardly necessary to go to the question of what if any vitality *Snowden v. Hughes* has today. Examination of the statutes and relevant decisions of this Court respecting statutory vagueness amply refutes Appellants' contentions.

To start with it should probably be observed that the obvious reason for the current popularity of attacks upon disliked statutes on the ground of their being unconstitutionally vague is that a plausible argument can almost always be made in support of such attacks. Most words, virtually all sentences, and certainly all statutory or constitutional provisions, are to some extent vague and susceptible of differing interpretations (i.e. "ambiguous"). Nowhere is this more true than in the very constitutional provisions which Appellants rely upon in making this attack. What could be more vague than those Fourteenth Amendment terms "due process" and "equal protection?" Would any attorney be so rash as to say that these much debated terms establish clear cut and/or immutable standards? If all vagueness, uncertainty and ambiguity

were fatal to the validity of statutory enactments we would have no statutes, and both the federal and state constitutions themselves would also have to be declared too vague to stand.

Fortunately, this is not the case. The fact that a statute may require interpretation, that it may be difficult to interpret, or that it is susceptible of different interpretations, will not render it unconstitutional. If a statute is susceptible of any sensible construction at all, it is the duty of the courts to fill in such gaps as may exist and supply such interpretation and construction as may be required to save the law, with due regard being given to its purpose and the intent of the legislature. See, e.g. 82 C.J.S. *Statutes* § 68 (c), pp. 118-19. As stated by this Court in *Screws v. United States*, 325 U.S. 91, 100 (1945):

"Yet if the Act falls by reason of vagueness so far as due process of law is concerned, there would seem to be a similar lack of specificity when the privileges and immunities clause * * * and the equal protection clause * * * of the Fourteenth Amendment are involved. *Only if no construction can save the Act from this claim of unconstitutionality are we willing to reach that result.*" (Italics added.)

We think that the statutes involved in the instant case do not even come close to the constitutional danger zone (i.e. such complete vagueness and uncertainty as would make it impossible for the Court to furnish any rational construction). Quite to the contrary the present statutes are of far more than average clarity (as statutes go) and really require little "judicial interpretation" at all.

Looking first to Ga. Code Ann. § 59-101, pertaining

to jury commissioners, Appellants say that the standards set forth therein respecting qualifications and eligibility are unconstitutionally vague, indefinite, and uncertain. The lack of any further specificity in Appellants' original complaint caused us at one point to wonder whether under their own theory, their complaint was itself so vague, uncertain and ambiguous as to cause any requirement that defendants respond to the point to be a denial of defendants' right to defend themselves as guaranteed by the "due process" clause of the Fourteenth Amendment. But we will pass this interesting question and proceed instead upon the assumption that the particular qualification complained of is that mentioned in the Jurisdictional Statement, which is the one directing the judge of the superior court, when exercising his discretion regarding the selection of jury commissioners, to select "discreet" persons.

We find it somewhat difficult to understand why Appellants are unable to comprehend this word, which is a word of common usage in the English language, and contained in all standard dictionaries. A "discreet" person is one who is possessed of good judgment or, in other words, prudent. See *Webster's Third New International Dictionary* (3d Ed. 1961), p. 647. Surely this is not an undesirable qualification for a person selected by a judge to be a jury commissioner and it is hoped that the judge would attempt to fill such positions with the most prudent (i.e. discreet) persons available even in the absence of the statutory directive.

What Appellants really dislike, of course, is that the term, as used in the statute, calls for a value judgment on the part of the judge. But there is not yet any con-

stitutional requirement that appointive offices be filled by lottery, by computer or by precise objective standards capable of mathematical application. Somewhere along the line decisions must be made and discretion must be exercised. The latter, it is submitted, necessarily involves value judgments. We think this rule is as applicable to the appointment of county jury commissioners as it is to the appointment of Federal judges, who are permitted to hold their appointive offices, it may appropriately be noted, "during good behavior." See 28 U.S.C. §§ 44, 133, 134.

What we have said above respecting the attack upon Ga. Code Ann. § 59-101 would seem to be equally applicable to Appellants' allegations respecting Ga. Code Ann. § 59-106 which refers to the compiling of a jury list from a cross-section of the "upright and intelligent" citizens of the county. The word "intelligent" surely needs no explanation. Clearly the village idiot can be kept off the jury list without offending the constitution. Nor can the word "upright" be said to pose any great mystery. As in the case of (but undoubtedly with greater specificity than) the phrase "during good behavior," it relates to a person's character and reputation.

As the Court is aware, the law permits men to be hanged or set free through testimony as to their general "reputation" in the neighborhood (and indeed prohibits specifics to be used to further explain or illustrate the term). See 22A C.J.S. *Criminal Law* § 676; 32 C.J.S. *Evidence* §§ 434, 436. Once again the real objection of Appellants is not one of uncertainty or vagueness, but is their dislike of the fact that any discretion at all (which as already pointed out necessarily involves value judg-

ments) exists in the compiling of the jury list. As in the case of jury commissioners the people of Georgia, speaking through their legislature, disagree with Appellants. They think an exercise of judgment in the filling of a public office or position of public responsibility by appointment is wise and desirable. We are quite convinced that this universal practice¹ is constitutional as well as wise.

Finally, Appellants also attack Ga. Code Ann. §§ 32-902, 32-902.1, 32-903 and 32-905, relating to county boards of education, as having "standards set forth therein" which violate the constitution because they are vague, uncertain and ambiguous. Again there were no specifics in their own vague, uncertain and ambiguous complaint as to what standards in these rather lengthy code provisions they complained of. In view of impossibility of knowing what Appellants consider to be vague or unclear, we will avoid the one hundred pages or more which would be required to analyze each and every clause of the statutes and confine ourselves instead to the questions posed by the trial court during the initial hearing in the case. That court's questions all related to the meaning of that clause of Ga. Code Ann. § 32-903 (i.e. qualifications of school board members) which provides:

". . . they shall elect men of good moral character, who shall have at least a fair knowledge of the ele-

¹At pp. 12-13 of their Jurisdictional Statement, Appellants list juror character qualifications of some twenty states. Concerning many appointive offices, of course, the discretion of the appointing authority is not nearly so limited by statute and such discretion is consequently far broader.

mentary branches of an English education and be favorable to the common school system."

In light of what has already been said regarding the attacks on Ga. Code Ann. §§ 59-101 and 59-106, the initial clause (i.e. "good moral character") poses no problem. It simply calls for a value judgment regarding the character of a prospective appointee to the board. It is no more vague than "general reputation in the community" which as already pointed out can determine whether an accused shall be hanged or set free, is at least as clear as the terms "discreet," "upright" and "intelligent," and with the greatest respect we submit it is somewhat clearer than the "during good behavior" which the distinguished justices of this honorable Court are allowed to sit under Art. III, Section I of the United States Constitution. Once again it can be said that there is really no question of vagueness here, but only complaint of the fact that the language calls for a value judgment. As already pointed out, this not only is not a constitutional defect but to the contrary represents the wisdom of the ages as well as presently sound public policy of obtaining the best persons available for public office.

The second clause (i.e. "at least a fair knowledge of the elementary branches of an English education") is a clause which appeared to be somewhat troublesome to the court below and to our way of thinking is perhaps the sole clause which may legitimately be said to require something more than minuscule judicial interpretation. In its historical context it would appear that the term "English education," which appeared in Article VII, Section I, Paragraph I of the Constitution of the State

of Georgia of 1877 respecting the authorization of taxation by the State for:

“ . . . educational purposes in instructing children in the elementary branches of an English education only,”

and which in 1920 was replaced by the broader phrase “for educational purposes” (now in the equivalent revenue provision of the 1945 Constitution, see Art. VII, Sec. II, Par. I; Ga. Code Ann. § 2-5501), was not removed from Ga. Code Ann. § 32-903, which was originally enacted in 1919. See Ga. Laws, 1919, pp. 288, 321. While we have been unable to locate any Georgia decision interpreting the phrase “English education” it does appear that the term is one which was of popular usage in the earlier days of public education. Thus in *Powell v. Board of Education*, 97 Ill. 375, 380 (1851), the Supreme Court of Illinois declared:

“ . . . it must be conceded the education to be afforded to the children of the State . . . is what is popularly understood to be an ‘English education.’ But what is an ‘English education.’ Mathematics, geography, geology, and other sciences taught in the schools are no more a part of an English education than they are of a German education. An education acquired through the medium of the English language is an English education; but if the same branches were taught in the German language it would be a German education. It is, therefore, the language employed as a medium of instruction that gives the distinctive character to the education, whether English, German or French, and not the particular branches of learning studied.”

Under this construction, coupled with the fact that “elementary branches” manifestly has reference to the

branches or subjects taught in the elementary (or less than high school) grades, see 78 C.J.S. *Schools and School Districts* § 1, p. 608, we submit that the most reasonable construction and interpretation of the qualification "at least a fair knowledge of the elementary branches of an English education" would be a level of learning consisting of or equivalent to at least an elementary school education in the English language (which presumably would include the ability to read and write in the English language).

In any event such language, whether construed in this manner by the Court or whether construed as a lesser requirement of a bare ability to read and write in English, is *susceptible* of plausible construction and hence cannot properly be held to be unconstitutionally vague. *Screws v. United States*, 325 U.S. 91, 100 (1945); 82 C.J.S. *Statutes* § 68 (c), pp. 118-19.

The final clause about which the United States District Court asked questions was the statutory directive that persons selected as members of the county board of education "be favorable to the common school system." We pointed out in that court that the term "common school system" is generally understood to mean the "public school system" consisting of public elementary and high schools, as contradistinguished from colleges, universities and other institutions of higher learning as well as from private or parochial schools. See e.g. 78 C.J.S. *Schools and School Districts* § 1, pp. 606-7. To favor this system simply means to be well disposed toward its maintenance and perpetuation. To illustrate with the reverse side of the coin, we think this qualification means that a person who wishes to abolish public

schools and revert to a system whereunder education is furnished, if at all, only by churches or other private organizations, would not be qualified to be a member of a county school board. A county school board member must, in other words, be in favor of maintaining a system of education at public expense for all eligible children of the county who desire to avail themselves of the same. While we think that this statutory clause really needs little in the way of judicial interpretation, it can at the very least be said that as all of the other statutes discussed herein, it is susceptible of construction and hence can not be said to be unconstitutionally vague.

It is respectfully submitted that Appellants' attacks of unconstitutional vagueness and ambiguity against the State laws in question are as far-fetched as their contention that said laws are racially discriminatory on their face.

- (b) *The subsidiary issue of discrimination against individuals who are not "freeholders" respecting membership on county boards of education is not properly raised, and in any event fails to present a substantial federal question.*

Article VIII, Section V, Paragraph I of the Constitution of the State of Georgia of 1945 (Ga. Code Ann. § 2-6801), as well as Ga. Code Ann. § 32-902, provides that members of county boards of education shall be "freeholders."² Appellants attack this provision under the equal protection clause of the Fourteenth Amend-

²*Black's Law Dictionary* (4th Ed. 1951) p. 793 defines a "freeholder" as one having title to realty either of inheritance or for life.

ment upon the theory that exclusion of non-freeholders from this county political office constitutes an arbitrary and unreasonable classification.

It would seem in the first instance that Calvin Turner is wholly without standing to raise this issue either in his own right or as a representative of any conjectural class of non-freeholders for the simple reason that he testified in open court that he in fact did own real property in Taliaferro County. It would also seem clear from Appellants' concession in the district court that many other Negroes own property in Taliaferro County, that any attempt to inject the race issue into this particular eligibility requirement is truly tilting at windmills. Surely any Negro aspirant for the office of county school board could manage to obtain a conveyance from some property owner of the single square inch of land required to meet this particular requirement. In point of fact Appellants, in raising this wholly academic question, are clearly seeking to obtain an advisory opinion of the Court. There is neither testimony nor any other evidence in the record of anyone, black or white, either in Taliaferro County or anywhere else in Georgia, having been excluded from membership on a county board of education by virtue of the "freeholder" requirement, much less any evidence of the qualification being utilized for purposes of racial discrimination. This sham issue presents neither a case nor a controversy within the meaning of Article III, Section II of the United States Constitution, much less a substantial federal question.

Finally, it may be noted that even if this issue had been properly raised by someone who had been deprived of a public office, Appellants position is contrary to law.

In the absence of any express prohibition in the State Constitution the courts, so far as we have been able to determine, have uniformly upheld property qualifications for political office. See e.g. *Becraft v. Strobel*, 287 N.Y.S. 22, 29 (1936), *aff'd*. 274 N.Y. 577, 10 N.E.2d 560 (1937); *State v. McAllister*, 38 W. Va. 485, 18 S.E. 770, 773 (1893). And in *Vought v. Wisconsin*, 217 U.S. 590 (1910), where a Wisconsin statute requiring jury commissioners to be "freeholders" was attacked as a denial of "due process" and "equal protection" by individuals indicted by grand jurors who had in turn been appointed by such freeholder jury commissioners, this Court thought the federal question so clearly without merit as to justify dismissal on jurisdictional grounds. While the desirability and wisdom of the "freeholder" requirement may indeed be open to question, we think that as far as the constitutionality of the same is concerned, the compilers of the law in 42 Am. Jur. *Public Officers* § 49, were entirely correct when they said:

"Undoubtedly a legislature has power to impose a property qualification upon office holders."

CONCLUSION

For the reasons stated herein the instant appeal should be dismissed for want of jurisdiction, or, in the alternative the judgment of the United States District Court for the Southern District of Georgia sought to be reviewed should be affirmed on the ground that the questions upon which the decision below depended were fully explored, correctly answered, and do not warrant or justify further argument.

Respectfully submitted,

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FILED
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**IN THE
SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1959.

No. 23

**CALVIN TURNER, et al.,
Appellants,**

v.

**W. W. FOUCHE, et al.,
Appellees.**

**Appeal from the United States District Court for the
Southern District of Georgia.**

**MOTION OF APPELLERS (OTHER THAN STATE OF
GEORGIA) TO DENY OR AFFIRM AND
ARGUMENT IN SUPPORT THEREOF.**

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 842.

CALVIN TURNER, et al.,
Appellants,

v.

W. W. FOUCHE, et al.,
Appellees.

Appeal from the United States District Court for the
Southern District of Georgia.

**MOTION OF APPELLEES (OTHER THAN STATE OF
GEORGIA) TO DISMISS OR AFFIRM AND
ARGUMENT IN SUPPORT THEREOF.**

OPINION BELOW.

The opinion of the court below is now reported 290 F.
Supp. 648.

INTRODUCTORY STATEMENT.

The jurisdictional statement of appellants was received by counsel for appellees other than State of Georgia December 15, 1968. On January 8, 1969, John W. Davis, Esq., Clerk of this Court, extended the time for filing of motions by us to January 31, 1969.

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, said appellees move:

- (a) That the appeal be dismissed, or, in the alternative
- (b) That the judgment of the District Court be affirmed.

With respect to the motion to dismiss, said appellees show that the jurisdictional statement recites:

“Jurisdiction of this Court is invoked pursuant to 28 U. S. C., § 1253, to review the judgment of the district court. That court was properly convened pursuant to 28 U. S. C., § 2281, because the action seeks to restrain enforcement of state statutes and constitutional provisions on the ground that they violate the Federal Constitution. See e. g. *Idlewild Bon Voyage Liquor Corporation v. Epstein*, 370 U. S. 713 (1962).”

Movants aver that the three-judge court was not properly convened pursuant to 28 U. S. C., § 2281, for that the averments of the complaint did not constitute a case cognizable by a Three-Judge Court.

With reference to the motion to affirm, said appellees aver that even if their motion to dismiss be denied, the questions presented are so unsubstantial as not to warrant further argument.

ARGUMENT ON MOTION TO DISMISS.

As stated by the District Court:

"Defendants named in the complaint are the members of the Board of Education of Taliaferro County and the jury commissioners of Taliaferro County. Additionally, three citizens of Taliaferro County were sued individually and in their capacity as grand jurors of Taliaferro County but they were dismissed by an order entered on January 30, 1968, granting a motion to dismiss for failure to state a claim against them upon which relief could be granted." 290 F. Supp. at p. 650.

There was a motion filed to dissolve the Three-Judge Court. It was denied. Its grounds were:

(a) No substantial question of the constitutionality *vel non* of any state statute appears from the face of the pleadings, the mere allegation that certain statutes are unconstitutional under certain clauses of certain amendments to the Constitution being insufficient;

(b) No substantial question of the Georgia statutes quoted in the complaint is raised in that the complainant does not seek to forestall the demands of any general state policy, the validity of which he challenges;

(c) A Three-Judge Court is not required or authorized in a case where the complaint is that the statutes are unconstitutional as applied.

It is clear that the complaint did not seek to forestall the demands of any general state policy, the validity of which was challenged.

The only case cited by the appellants in their jurisdictional statement to sustain the jurisdiction of a Three-Judge Court is **Idlewild Bon Voyage Liquor Corp. v. Ep-**

stein, et al., 370 U. S. 713. There the suit was filed in a Federal District Court after the appellant there had "been informed by officials of the State of New York that its business . . . was illegal under a state statute . . ." Petitioner sought to have that statute, as applied, declared repugnant to certain provisions of the Federal Constitution. The Court of Appeals of the Second Circuit thought that a Three-Judge Court should have been convened but that it was powerless to direct such action. The Supreme Court held that a Three-Judge Court should have been convened, and remanded the case for expeditious action in accordance with that view.

There, as expressed by the Court of Appeals, the complaint challenged "the constitutionality under the Federal Constitution of a state statute and" challenged "it because of the way that statute was being applied by the regulatory commission created by it. **Stratton v. St. Louis, S. W. Ry.** . . . 282 U. S. 10 . . . in clear and unequivocal terms declared that the three-judge district court was meant to be the tribunal to deal with constitutional challenges to state activity." **Idlewild v. Rohan** (289 F. 2d at 428).

In **Stratton**, *supra*, the action was brought by a railway company against the Secretary of State of Illinois to restrain the enforcement of minimum franchise tax statute of the State of Illinois.

Here, the defendants were members of the Board of Education of Taliaferro County and the jury commissioners of that county, all local officials, and three citizens of that county who were sued individually and in their capacity as grand jurors of Taliaferro County.

In that situation, the rule of **Ex parte Collins**, 277 U. S. 565, should have been applied, and the Three-Judge Court dissolved.

Ex parte Collins, supra, is followed and applied in **Pierre v. Jordan**, 333 F. 2d 951, 956, wherein the Ninth Circuit Court of Appeals held:

“Section 2281 requiring three judge district courts in certain cases, does not apply where, although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to a particular municipality or district” (Certiorari denied, 379 U. S. 974; Petition for rehearing denied, 380 U. S. 927).

See also:

Phillips v. United States, 312 U. S. 246;

Ex parte Bransford, 310 U. S. 354.

Ex Parte Collins, supra, has recently been cited, applied, and followed in **Moody v. Flowers**, 387 U. S. 97, wherein at page 101-2, Mr. Justice Douglas writing for the Court wrote:

“The Court has consistently construed the section as authorizing a three-judge court not merely because a state statute is involved but only when a state statute of general and statewide application is sought to be enjoined. See, e. g. **Ex parte Collins**, 277 U. S. 565 . . . The term ‘statute’ in § 2281 does not encompass local ordinances or resolutions. The officer sought to be enjoined must be a State officer; a three-judge court need not be convened where the action seeks to enjoin a local officer (**Ex parte Collins**, supra; **Rorick v. Board of Commissioners**, supra) unless he is functioning pursuant to a state policy and performing a state function. **Spielman Motor Sales Co. v. Dodge**, 295 U. S. 89 . . . Nor does the section come into operation where an action is brought against state officers performing matters of

purely local concern. *Rorick v. Board of Commissioners, supra*” (307 U. S. 208).

As we shall presently show the situation is not like that considered in **Sailors v. Board of Education of County of Kent**, 387 U. S. 105, decided the same day in **Moody v. Flowers**, *supra*, and distinguishing it (p. 107).

“To raise a substantial constitutional question, the complainant must ‘seek to forestall the demands of **some general state policy**, the validity of which he challenges.’ *Phillips v. United States*, 312 U. S. 246 . . .;” **Clemmons v. Congress of Racial Equality**, 201 F. Supp. 737, 745-6.

Here—there is no general state policy involved or challenged.

No state officer is named as a party defendant.

The gist of the alleged cause of action (complaint, Par. 18) is that plaintiffs . . . “are unable to enjoy the full and equal benefit of public education in Taliaferro County, Georgia.”

That county is one of 159 in Georgia. It ranks 154th in population among the 159. It has a population (1960 census) of 3370. The population of Georgia by the same census was 3,943,116. So, involved are 1/1300 of the people of Georgia. It has an area of 195 square miles of Georgia.

That the alleged situation is peculiar to Taliaferro County is graphically shown by the averments of Paragraph 11 of the complaint:

“Defendants have chosen and threaten to continue to choose an all-white school board to superintend the all-black public schools of Taliaferro

County, Georgia, pursuant to a number of State Constitutional statutes (sic) or provisions.”

Paragraphs 9, 10, 11 (a), 11 (c), 11 (d), 12, 13, 14, 15, 16, 17, 18, indeed, every paragraph save one (Par. 8) of the “Cause of Action” sought to be alleged in the complaint (III, pages 3-10) pertain only to Taliaferro County.

At page 3 of the “Jurisdictional Statement” are the “Questions Presented.” The second is:

“Whether the Georgia system of selection of school board members violates the Thirteenth, Fourteenth and Fifteenth Amendments where Negroes constitute over sixty per cent of the population, fifty per cent of the electorate, and all of those attending public schools, but only a disproportionate minority of those who appoint board members?” (Emphasis added.)

That the alleged situation applies only to Taliaferro County is shown by the “Introduction” to the “Statement” in the same document (page 3).

Also, therefore, it is clear that the plaintiffs are attacking only the application of those amendments (and statutes) to the facts as they are alleged to exist in one of Georgia’s 159 counties.

“The plaintiff has made sweeping statements as to the constitutionality of Art. 542 l. c. In substance, however, he attacks only the application of the statute to the facts in question. In these circumstances, a three-judge Federal court need not be convened. *Phillips v. United States*, 1941, 312 U. S. 246, 61 S. Ct. 480, 85 L. Ed. 800.” **McGuire v. Sadler**, 337 F. 2d 902, 906 (U. S. C. A., Fifth Circuit—Circuit Judges Tuttle, Rives and Wisdom).

That the questions presented are unsubstantial will be more fully argued in connection with the motion to affirm.

That factor is one to be considered also in connection with the convening of a Three-Judge Court.

“To warrant direct appeal to Supreme Court under Judicial Code, § 266, as amended by Act Feb. 13, 1925, § 1 (Comp. St. Supp. 1925, § 1243), question of constitutionality of statute must be substantial.” In **re Buder, et al.**, 46 S. Ct. 557 (4), 271 U. S. 461 (Judicial Code, § 266, was a predecessor of the present Title 28, U. S. C.).

Buder, as well as **L&N R. Co. v. Garrett**, 231 U. S. 298, are cited approvingly in **Ex Parte Paresky**, 290 U. S. 30.

In **People of the State of Illinois ex rel. Sankstone v. Jarecki**, 346 U. S. 861, 74 S. Ct. 107, the Supreme Court granted motions to dismiss and dismissed an appeal for the want of a substantial federal question. The facts and opinion appear, 116 F. Supp. 422. Cited there in support of the ruling were: **Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.**, 292 U. S. 386, 54 S. Ct. 732, and **California Water Service Co. v. City of Reading**, 304 U. S. 252.

The Oklahoma case (292 U. S. at page 390) categorically holds: “The procedure prescribed by Section 266 may be invoked only if the suit is one to restrain the action of state officers.” At page 391, the court said the three-judge procedure “designed for a specific class of cases, sharply defined, should not be lightly extended.”

The California case holds that a substantial federal question must be presented.

“The jurisdiction of the three-judge court, or of the Supreme Court on appeal, may be raised at any point in the proceeding. It may be raised for the first time when the case reaches the Supreme Court. United

States v. Griffin, 303 U. S. 226. Or it can be raised by the Court on its own motion. Stratton v. St. Louis Southwestern R. Co., 282 U. S. 10."

Supreme Court Practice (Robert L. Stern; Eugene Gressman), Third Edition, pp. 51-2.

We raised the question at the outset by a motion to dissolve the Three-Judge Court. The court below denied our motion, but in its opinion (290 F. Supp. at page 652) said:

"The court finds and concludes that the constitutional provision and the statutes in question are not unconstitutional on their face or as applied. There is nothing in the constitutional provision or in the statutes which contemplates or permits the resulting systematic exclusion from the grand juries. The standards are not inadequate. The facts showed systematic exclusion in the administration of the grand jury system prior to the revision but this resulted from the administration of the system and not from the constitutional provision and statutes under attack. The court also concludes that the provision requiring that members of the school board be freeholders has not been shown to be an unconstitutional requirement. There was no evidence to indicate that such a qualification resulted in an invidious discrimination against any particular segment of the community, based on race or otherwise. There is thus no merit in the three-judge District Court questions presented."

We invoke that quotation as a prelude to our

ARGUMENT ON MOTION TO AFFIRM.

The quotation above shows that the questions presented are so unsubstantial as not to warrant further argument.

We have hereinbefore discussed the second of the "questions presented" as stated by the appellants in their jurisdictional statement. The other two questions presented were stated at page 3 of that statement as follows:

"1. Whether Georgia's restriction of service on juries to the 'upright and intelligent' and on jury commissions to the 'discreet' violates the Fourteenth Amendment where both provisions provide an 'opportunity to discriminate' racially which has been 'resorted to'?"

"3. Whether Georgia's restriction of service on juries to freeholders violates the Fourteenth Amendment?"

As we first read question 3 we were convinced that counsel for the appellants had mis-stated the question. There is no such restriction of service on juries in Georgia.

What counsel for appellant intended to say is shown at page 24 of the statement: "The state's restriction of membership on County Boards of Education to freeholders violates the equal protection clause of the Fourteenth Amendment."

By letter of December 16, 1968, counsel corrected the erroneous question on page 3.

At page 11, counsel for appellants argue:

"Ga. Code Ann. Title 59, §§ 101, 106 are unconstitutionally vague and discriminate against Negroes by permitting their arbitrary exclusion from service as Jury Commissioners and jurors in violation of the Fourteenth Amendment to the Constitution of the United States."

§ 59-101, Ga. Code Ann. provides for the appointment of a board of jury commissioners by the judge of the superior court. The superior court in Georgia is the highest trial court. Judges thereof are elected by the people though the governor may appoint to fill vacancies in judgeships.

The boards of jury commissioners in each county are composed of six persons. They must **not** be practicing attorneys at law or county officers. They must be discreet.

The constitutional attack on this section derives from the use of the adjective "discreet." It is argued that this adjective creates uncertainty, indefiniteness, vagueness.

Under the Constitution of Georgia (Art. VI, § XIII, par. 1—Ga. Code Ann., § 2-4801) no person may be a superior court judge unless he (or she) shall have attained the age of 30 years, shall have been a citizen of the state three years, and have practiced law for seven years. Certainly a person possessing those qualifications will be presumed to know that "discreet" means "prudent; cautious; wary; careful about what one says or does" or, if he doesn't know to look up its meaning.

Discreetly means with discernment, prudently, judiciously.

Parks v. DesMoines, 191 N. W. 728.

Ga. Code Ann. Title 58, § 106, as set out at pages 44-45 of the Jurisdictional Statement is evidently derived from an act of the General Assembly (approved March 30, 1967) appearing in Vol. I, Georgia Laws 1967, p. 251.

Ga. Code Ann. Title 59, § 106 as it appears in the 1968 Cumulative Pocket Part thereof seems to be derived from an act of the General Assembly of 1968 (p. 533).

An editorial note appended thereto is "Acts 1968, p. 533, entirely superseded the former section."

Both acts contain the phrase to which appellants object, to wit: "upright and intelligent citizens."

The standard of "uprightness and intelligence" can certainly not be adjudged uncertain, indefinite or vague.

For a century at least that standard has appeared in the Georgia law. Georgia's constitution of 1868 (the year of the adoption of the Fourteenth Amendment) declared "that the General Assembly shall provide by law for the selection of upright and intelligent persons to serve as jurors" (**Moses v. State**, 60 Ga. 140, 141). The act of 1869 (Ga. Laws 1869, p. 139) provided in what manner those upright and intelligent persons shall be selected as jurors.

A "statute is constitutional on its face if it be sufficiently clear to furnish guide to anyone who proposes to act in light of its provisions."

Turner v. Goolsby, 255 F. Supp. 724, 725 (1).

See also

McGowan, et al. v. Maryland, 366 U. S. 420, 421 (2), 428-9;

United States v. Harriss, 347 U. S. 612, 617-8;

United States v. Petrillo, 332 U. S. 1.

Section 59-106 as it appeared in the Code of 1933 used the phrase "upright and intelligent" as did the codes back to 1869, to wit: 1910, P. C., § 819; 1895, P. C., § 818; 1882, § 3910 (d); 1873, § 3907.

There seems to be no Georgia case in that whole century defining the phrase. We suppose that is so because the meaning of the words is so plain that in 100 years no one has questioned their meaning.

We find no adjudicated meaning of the phrase in "Words and Phrases" though "integrity" has been defined as synonymous with probity, honesty and **uprightness** in business relations with others.

In re Bauquier's Estate, 26 Pac. 178;

In re Gordon's Estate, 75 Pac. 672.

"In the absence of any constitutional provision on the subject, and so long as the essential requirements of trial by jury are preserved, the qualifications of jurors are matters of legislative control and in the exercise of its control, the legislature may restrict, abridge, deny or enlarge the right and duty of jury service." *Juries*, 50 C. J. S., § 134, citing among others: **Hoxie v. U. S.**, 15 F. 2d 762; **Tynan v. U. S.**, 297 Fed. 177, in each of which certiorari was denied, and **U. S. v. Roemig**, 52 F. Supp. 857.

As corrected, the third question presented is: Whether Georgia's restriction of membership on County Boards of Education to "freeholders" violates the Equal Protection Clause of the Fourteenth Amendment.

(Appellant, Calvin Turner, testified that he was a real property owner, so that question hardly affects him.)

Title 32, § 902 (Appendix to Jurisdictional Statement, p. 41), Ga. Code Ann. requires that county boards of education be composed of "five freeholders." So does Article 8, Section 5, Par. 1 of the Georgia Constitution. (*Ibid*, p. 40).

The complete answer to this phase of the case would seem to be **Vought, impleaded with Collins v. State of Wisconsin**, 217 U. S. 590.

The plaintiff in error was convicted and sentenced. He asserted that the law under which the jury was drawn

violated the Fourteenth Amendment in that "it is a denial of equal protection of the law and of due process of law to be put on trial under an indictment found by persons selected by jury commissioners who are required by statute to be freeholders."

The court disposed of the contention in two sentences: "Writ of error dismissed for want of jurisdiction. The Federal question attempted to be raised is without merit."

Thus a state may constitutionally require a jury commissioner to be a freeholder. *A fortiori*, a State may require a member of a County Board of Education to be a freeholder. The reasons are succinctly discussed by the Supreme Court of Georgia in **Thornton v. McElroy**, 193 Ga. 859. There, an act of the General Assembly creating the Board of Commissioners of Roads and Revenues of Clayton County provided that the commissioners should be freeholders and qualified voters of said county. McElroy was not a freeholder of Clayton County though he did own land in another county. He was held to be disqualified. The court said:

"This is also the reasonable construction to be given the sentence, because a person's ownership of land in one county would seem to have little or no relationship to his qualification to hold office as a county commissioner in another county, while his ownership of land in the county in which he is elected commissioner might be expected to have a direct bearing on his conduct in the performance of the duties of that office. The board of commissioners has charge of the fiscal affairs of the county, and the amount of taxes levied may depend to a large extent upon the manner in which the affairs of the county are conducted by that board. A commissioner who owns real estate in the county, which must bear its proportionate part of the cost of government, might

reasonably be expected to be more prudent in the expenditure of county money than one who does not own property in the county."

Appellants do not in the appendix to their jurisdictional statement include all of the sections of the Georgia Code pertaining to the powers and duties of county boards of education. They are by no means limited to "recommending a school tax vote" as suggested at page 26 of the jurisdictional statement. These boards "are invested with the title, care and custody of all schoolhouses or other property, with power to control the same in such manner as they think will best serve the interests of the common schools; and when in the opinion of the board, any schoolhouse site has become unnecessary or inconvenient, they may sell the same in the name of the county board of education; . . . (Ga. Code Ann., § 32-909). In respect to the building of schoolhouses, the said board of education may provide for the same by a tax on all property located in the county and outside the territorial limits of any independent school system" (Ibid.).

We will not labor the question by detailing other duties of such boards.

A person having such fiscal responsibilities should have the qualification of having acquired some property himself. At least, the General Assembly thought so, and certainly its thought cannot be deemed arbitrary and capricious.

"State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it" . . . (citing cases). **McGowan v. Maryland**, 366 U. S. 420, 425-6.

**SPECIAL MOTION TO DISMISS OR AFFIRM WITH
RESPECT TO W. W. FOUCHE, RASTUS DURHAM
AND ELMO BACON, INDIVIDUALLY, AND AS
REPRESENTATIVES OF THE CLASS OF PER-
SONS KNOWN AS GRAND JURORS OF TALIA-
FERRO COUNTY, GEORGIA.**

The notice of appeal filed in the court below October 14, 1968, includes in the caption thereof Fouché, Durham and Bacon, individually and as representatives of the class of persons known as Grand Jurors of Taliaferro County, Georgia.

On motion of the defendants, the defendants Fouché, Durham and Bacon, individually and in their capacities as Grand Jurors of Taliaferro County, Georgia, were by order of the court dated January 30, 1968, stricken as defendants. See the opinion of the court below, 290 F. Supp. 648, 650; Jurisdictional Statement, page 31.

No review of that action of the court is sought in this appeal.

Whatever may be the decision of the court generally as to our motion to dismiss or affirm, Fouché, Durham and Bacon should be stricken as parties.

Respectfully submitted,

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Certificate of Service.

A copy of the within and foregoing Motion to Dismiss or affirm, with supporting argument on behalf of appellees, other than the State of Georgia, has been sent by United States mail with proper postage affixed to the following:

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This January 28th, 1969.

.....
Of Counsel for Appellees other
than State of Georgia.

APPENDIX

APPENDIX.

SELECTION OF GRAND AND TRAVERSE JURORS.

Code § 59-106 Amended.

No. 963 (Senate Bill No. 360).

An Act to amend Code section 59-106, as amended, particularly by an Act approved March 30, 1967 (Ga. L. 1967, p. 251), so as to provide that after the jury commissioners of a county have selected citizens to serve as jurors from the jury list, no new jurors shall be selected from the jury list until the original selection has been completely exhausted; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. Code section 59-106, as amended, particularly by an Act approved March 30, 1967 (Ga. L. 1967, p. 251), is hereby amended by striking said section in its entirety and inserting in lieu thereof a new section 59-106, to read as follows:

“59-106. At least biennially, or, if the judge of the superior court shall direct, at least annually, on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall compile and maintain and revise a jury list of intelligent and upright citizens of the county to serve as jurors. In composing such list the commissioners shall select a fairly representative cross-section of the intelligent and upright citizens of the county from the official registered voters' list which was used in the last preceding general election. If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross-

section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly representative thereon.

After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifth of the whole number to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, except as otherwise provided herein, and no new names shall be added until those names originally selected have been completely exhausted, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved April 1, 1968.

Ga. Laws 1968, pp. 533-4.

32-909 School property and facilities. The county boards of education shall have the power to purchase, lease, or rent school sites, build, repair or rent school houses, purchase maps, globes, and school furniture, and make all arrangements necessary to the efficient operation of the schools. The said boards are invested with the title, care and custody of all schoolhouses or other property, with power to control the same in such manner as they think will best serve the interests of the common schools; and when, in the opinion of the board, any schoolhouse site

has become unnecessary or inconvenient, they may sell the same in the name of the county board of education, and said county boards of education may convey any schoolhouse site or building, which has become unnecessary or inconvenient for county school purposes and which is located in a municipality, to the municipality wherein said site or building is located to be used by said municipality for educational or recreational purposes in consideration for the municipality's promise and agreement to maintain and keep said property in repair and insured against loss by fire and windstorm; such conveyance to be executed by the president or secretary of the board, according to the order of the board. They shall have the power to receive any gift, grant, donation or devise made for the use of the common schools within the respective counties, and all conveyances of real estate which may be made to said board shall vest the property in said board of education and their successors in office. In respect to the building of schoolhouses, the said board of education may provide for the same by a tax on all property located in the county and outside the territorial limits of any independent school system. The construction of all public school buildings must be according to the plans furnished by the county school authorities and the State Board of Education. (Acts 1919, p. 323; 1937, pp. 882, 892; 1946, pp. 206, 207; 1961, pp. 35, 38; 1962, pp. 654, 655.)

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JOHN F. DAVIS, JR.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~84~~ 23

CALVIN TURNER, *et al.*,

Appellants,

—V.—

W. W. FOCHE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

**APPELLANTS' BRIEF IN OPPOSITION TO
APPELLEES' MOTIONS TO DISMISS OR AFFIRM**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. 842

CALVIN TURNER, *et al.*,

Appellants,

—v.—

W. W. FOUCHE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

**APPELLANTS' BRIEF IN OPPOSITION TO
APPELLEES' MOTIONS TO DISMISS OR AFFIRM**

I.

In their motions to dismiss appellees challenge this Court's jurisdiction under 28 U.S.C. §1253 and invoke in support of their contention the doctrine of *Moody v. Flowers*, 387 U.S. 97, 102 (1968) where this Court vacated the judgment after finding a state statute "is not a statute of statewide application, but relates solely to the affairs of one county in the State". Appellees are not aided by this holding, however, for *Moody* does not require that allegations as to the unconstitutionality of a statutory scheme need derive their *proof* out of facts occurring in more than one county of a state. Nor did that case hold that other than county officials need be named as party defen-

dants where challenged statutes are "of statewide application." *Ibid.* In *Sailors v. Kent Board of Education*, 387 U.S. 105 (1967) decided the same day as *Moody*, this Court sustained three judge jurisdiction where officials of only one county were sued and the unconstitutional operation of the statutes were demonstrated in that county alone. Mr. Justice Douglas distinguished *Moody, supra* in language equally applicable to the instant case:

We conclude that a three-judge court was properly convened, for unlike the situation in *Moody v. Flowers*, . . . this is a case where the state statute that is challenged [footnote omitted] applies generally to all Michigan County school boards of the type described (387 U.S. at 107.)

Appellees rely heavily upon *Ex Parte Collins*, 277 U.S. 565 (1928) and its citation in *Moody, supra*. *Moody* did not cite the *Collins* case, however, for the proposition that proof of unconstitutionality was required to emanate from state party defendants or from activity proved to have occurred in every part of a state. Such an interpretation of *Collins* and *Moody* cannot stand in light of the decision in *Sailors*. What in fact, does need to be shown is that the statutes attacked manifest an unconstitutional policy of statewide applicability. Clearly those requirements are satisfied in the instant case.

Appellants have challenged as inconsistent with the federal Constitution state statutes applicable to all the counties of the state of Georgia. In their jurisdictional statement appellants challenged, *inter alia*, Georgia Code Ann. Tit. 32 §902 which provides membership on county boards of education shall be restricted to freeholders and Georgia Code Ann. Tit. 59, §§101, 106, which require that jurors

be "upright and intelligent" and jury commissioners be "discreet". Thus, as the court below held, a three-judge court was properly convened under 28 U.S.C. §2281 because this is an action seeking, *inter alia*, to restrain state officials from enforcing state statutes of general application on the ground that they unconstitutionally (a) distinguish between the poor and propertyless and those who own real property by excluding the former from school board membership and (b) state requirements for jury and jury commission service with impermissible vagueness and overbreadth. See *e.g.*, *Flast v. Cohen*, 392 U.S. 83 (1968); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962); *Query v. United States*, 316 U.S. 486 (1942). Although brought against local officials, this case is not a matter of purely local concern, because here relief is sought against the action of public officials, acting under challenged state statutes expressing the state's policy in relation to jury and school board selection. See *e.g.*, *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935); *Sailors v. Board of Education of the County of Kent*, *supra*. This is not merely an attack upon the "unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional." Cf. *Ex parte Bransford*, 310 U.S. 354, 361 (1940) (dictum).

Nor do 28 U.S.C. §§1253, 2281, as the state of Georgia appears to urge, require that a statute be challenged on the ground that it discriminates explicitly on the basis of race for a three-judge court to have jurisdiction. *Louisiana v. U.S.*, 380 U.S. 145 (1965). A challenge to a statutory scheme on the basis that it presents local officials with "opportunity for discrimination" clearly raises a substantial question of unconstitutionality. *Whitus v. Georgia*, 385 U.S. 545, 552 (1967); *Louisiana v. U.S.*, *supra*. The substantiality of the question is highlighted by the fact that

on several occasions in the past 16 years this Court has found itself compelled to reverse or remand convictions on the ground that an opportunity to discriminate was resorted to by county officials of the state of Georgia. E.g. *Whitus, supra*; *Anderson v. Georgia*, 390 U.S. 206 (1968); *Cobb v. Georgia*, 389 U.S. 12 (1967); *Avery v. Georgia*, 345 U.S. 559 (1953); *Williams v. Georgia*, 349 U.S. 375, 391-392 (1955). Appellants have shown by their proof as to Taliaferro County that it is anything but frivolous to allege that discrimination against Negroes in jury selection is permitted, and even invited¹ by Georgia law. Nor is it frivolous to allege that a political process which operates to dilute and to limit participation of Negroes violates the United States Constitution, *Dusch v. Davis*, 387 U.S. 112, 117 (1967). As previously shown, the fact that proof of the dilution is derived from the operation of the statewide scheme in one county does not remove the claim from the three-judge requirement, *Sailors, supra*.

II.

The state also argues that appellant Turner has no standing to challenge the statutory exclusion of non-freeholders from school board membership because he is a freeholder. The district court, however, permitted intervention of Joseph Heath, a father of several school children and non-freeholder, who plainly possessed requisite standing to challenge a statute which prohibited him from serving on the county school board. The court permitted intervention after appellees' counsel stated that he had no objection, "to make certain that the Court will reach the merits of

¹ See *South Carolina v. Katzenbach*, 383 U.S. 301, 312-313 (1966)

the claim
stitution

5

application based on freeholders is uncon-
3, 134).

Respectfully submitted,

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1968⁹

No. ~~302~~ 23

CALVIN TURNER, *et al.*,

Appellants,

—v.—

W. W. FOUCHE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

APPELLANTS' BRIEF

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IN THE

Court of the United States

TOBER TERM, 1968

No. 842

JOHN TURNER, *et al.*,

Appellants,

—v.—

W. FOUCHE, *et al.*,

Appellees.

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

APPELLANTS' BRIEF

Opinion Below

The court below is reported at 290 F. Supp. 968 (1968) and is set forth in the appellate litigation involving several of the parties (as *Turner v. Goolsby*, 255 F. Supp. 968 (1966)).

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Jurisdiction

This is an action for injunctive and declaratory relief in which jurisdiction of the district court was invoked under 28 U. S. C. §§1331, 1343, 2201-02; 42 U. S. C. §§1981, 1983, 1988, 1994, 2000d and 2000e; and the Fifth, Ninth, Thirteenth, Fourteenth and Fifteenth Amendments. The complaint sought, *inter alia*, to enjoin enforcement and operation of Georgia's constitutional and statutory scheme for the selection of jurors and county boards of education as in violation of the Constitution of the United States. A statutory three-judge court was convened pursuant to 28 U. S. C. §§2281, 2284 (A. 18).

The three-judge court determined that it was properly convened but found "no merit in the three-judge District Court questions presented" (A. 403). A final judgment and decree was entered on September 19, 1968 (A. 406-407). Timely notice of appeal to this Court was filed in the court below on October 14, 1968. On December 2, 1968, Mr. Justice Black extended the time for filing a Jurisdictional Statement to, and including, February 8, 1969. On February 24, 1969, this Court noted probable jurisdiction (A. 408). Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1253.

Constitutional and Statutory Provisions Involved

This action involves the following Georgia constitutional and statutory Provisions, which are set forth in an appendix *infra* pp. 1a-11a:

Article VIII, Section V, paragraph I, of the Constitution of the State of Georgia of 1945; Ga. Code Ann., §2-6801.

Article VIII, Section V, paragraph II, of the Constitution of the State of Georgia of 1945; Ga. Code Ann., §2-6802.

Ga. Code Ann. §23-802

Ga. Code Ann. §32-901

Ga. Code Ann. §32-902

Ga. Code Ann. §32-902.1

Ga. Code Ann. §32-903

Ga. Code Ann. §32-905

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Ga. Code Ann. §32-1118

Ga. Code Ann. §32-1127

Ga. Code Ann. §59-101

Ga. Code Ann. §59-106

Ga. Code Ann. §59-202

Ga. Code Ann. §59-203

Ga. Code Ann. §59-318

Ga. Code Ann. §59-319

This action also involves the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States.

Questions Presented

1. Whether statutory standards which govern Georgia jury selection are unconstitutionally vague and permit the arbitrary exclusion of Negroes from jury service in violation of the Fourteenth Amendment to the Constitution of the United States?

2. Whether the Georgia system of selection of school board members by the county grand jury operates to dilute Negro participation in the selection of the board in violation of the Thirteenth, Fourteenth and Fifteenth Amendments?

3. Whether Georgia's prohibition of service on school boards to non-freeholders violates the Fourteenth Amendment?

Statement

A. Initiation of This Litigation

On November 14, 1967, Calvin Turner, a registered Negro voter residing in Taliaferro County, Georgia, and his daughter, a student in the public schools of the county, brought this action against members of the county board of education, jury commission, and representative grand jurors. A Negro father of six school age children, who is not a freeholder, was permitted to intervene as a plaintiff (A. 72, 73). The complaint alleged that appellants, and others similarly situated, were denied rights guaranteed by the federal Constitution by the operation of Georgia statutory and constitutional provisions which authorize the selection of school board members and jurors.

Appellants contended, *inter alia*, that: (1) they had been denied an opportunity to serve as jury commissioners, grand jurors, and traverse jurors on account of race (complaint paras. 11(c), 11(d)); (2) they had been denied on account of race an opportunity to participate in the process of selecting the officials who administer the public schools of Taliaferro County (complaint, para. 11(a), (b)); and (3) they had been denied on account of poverty, and the requirement that school board members be freeholders, the opportunity to actually serve as board members (complaint 11(b)) (A. 7-14).

The complaint sought injunctive and declaratory relief as to the offending provisions of state law: Ga. Code Ann. §§2-6801; 32-902, 902.1, 903, 905; 59-101, 106; that membership on the board of education and jury commission be declared vacant; that a receiver be appointed to operate the public schools pending selection of a constitutionally acceptable board; that a special master select members of the grand and petit juries; and that ancillary damages be awarded (A. 16-17). Because appellants sought injunctive relief restraining the enforcement of state statutes and constitutional provisions, a three judge court was empanelled and the State of Georgia permitted to intervene (A. 18, 65).

B. District Court Proceedings

The district court held two hearings before it rendered its decision. At the first, January 23, 1968, the court found that the

evidence indicated and the court announced then and now so finds that Negroes were being systematically excluded from the grand juries through token inclu-

sion. . . . The grand jury situation was such that Negroes had little chance of appointment to the school board (A. 399).

Counsel for the appellees were directed "to familiarize defendants with the provisions of law relating to the prohibition against systematically excluding Negroes from the jury system" (A. 399). Appellees were also informed by the court that it would be appropriate if two Negroes were appointed to the school board (A. 252).

At the second hearing, February 23, 1968, the court was informed that the county jury list had been revised in light of the court's oral pronouncement that the master list was illegally composed, and that on February 16, 1968, the county grand jury had confirmed one Negro and one white man to fill two school board vacancies (A. 265-69).

On August 5, 1968, the district court entered its opinion, stating the issues as follows:

The thrust of the complaint is that the Negroes have no voice in school management and affairs in that there are no Negroes on the school board. It is contended that Art. VII [sic], §V, ¶I of the Constitution of the State of Georgia of 1945, Ga. Code Ann., §2-6801, and Ga. Code Ann., §§32-902, 902.1, 903 and 905, all having to do with the election of county school boards by the grand jury, are unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment and under the Thirteenth Amendment, both facially and as applied by reason of the systematic and long continued exclusion of Negroes and non-freeholders as members of the Board of Education of Taliaferro County, Georgia, and on

the selecting grand juries. The same contention is made with respect to the Georgia laws regarding the appointment of and service as jury commissioners. Ga. Code Ann., §§59-101 and 106 (Ga. Laws 1967, p. 251, Vol. 1). Here again unconstitutionality in application is asserted on the basis of systematic exclusion of members of the Negro race from service as jury commissioner. Unconstitutionality is claimed also by reason of the alleged uncertainty, indefiniteness, and vagueness of the standards set forth in each of the statutes (A. 398).

The district court concluded that the grand jury list, "as revised", is not unconstitutional and that state constitutional provisions and statutes governing jury and school board selection are not unconstitutional on their face or as applied: "The facts showed systematic exclusion in the administration of the grand jury system prior to the revision but this resulted from the administration of the system and not from the constitutional provision and statutes under attack" (A. 403).

The court also concluded that the requirement that members of the school board be freeholders is not unconstitutional:

"There was no evidence to indicate that such a qualification resulted in an invidious discrimination against any particular segment of the community, based on race or otherwise" (A. 403).

On September 19, 1968, the court entered a final judgment, in conformance with its opinion, upholding the validity of all the challenged state statutes and constitutional

provisions and denied relief,² other than to enjoin jury commissioners from "systematically excluding Negroes from the grand jury system" (A. 406).

C. Background of This Litigation

Consideration of appellants' claims requires some familiarity with general characteristics of Taliaferro County and earlier litigation between several of the parties.

According to the 1960 Census county population is:³

| | Number | Percent |
|------------------------------|--------|---------|
| White | 1,273 | 37.8 |
| Negro | 2,096 | 62.2 |
| White (over 21) | 877 | 47.3 |
| Negro (over 21) | 979 | 52.7 |
| White (over 18) ⁴ | 917 | 46.0 |
| Negro (over 18) | 1,073 | 54.0 |

While the exact number of registered voters of each race in the county was not known it was generally agreed—and the district court found—that Negroes and whites each constituted 50% of those registered (A. 368-69, 390, 399).

² The court declined in its discretion to consider a single-judge claim for ancillary money damages in the amount of \$500,000 to compensate plaintiffs for past deprivations and denials of federal rights. A prayer for attorney's fees was denied. Earlier the court had dismissed the complaint as to three defendants named individually as representative grand jurors (A. 71).

³ 1960 Census of population, Table 25, pp. 12-83, Table 27, pp. 12-130, and Table 28, pp. 12-148.

⁴ Of the 910 persons of school age in the county, 15.2% were white males; 13.2% white females; 39.6% non-white males and 32.1% non-white females. *Ibid.*

All of the teachers and children who attend public schools of the county are Negro although the superintendent is white (A. 21, 38-39; 24, 47, 52). The five-man county school board had not had a Negro member in the memory of board members until one was appointed as a consequence of this litigation (A. 23, 46); none of the white board members themselves had children attending the public schools (A. 23, 47, 20, 38). The county jury commission has been composed of whites for at least the last 50 years (A. 20, 38).

In 1965, Negro citizens of Taliaferro County, including appellant Turner, brought an action in the district court against the circuit solicitor, county sheriff, county attorney, superintendent of schools, and county board of education, alleging, in summary, that by misuse of their offices and by lodging unfounded criminal charges they had conspired to deny the rights of county Negroes to free speech and to a desegregated education. A three-judge court was convened and found that a public assembly protesting segregation had "set off a chain of events resulting in a flagrant unconstitutional application of the statute proscribing the disturbance of divine worship." *Turner v. Goolsby*, 255 F. Supp. 724, 727 (S. D. Ga. 1965). The court also described the tactics employed by whites to avoid desegregation of the schools:

There are only two schools in the county; Murden which is populated by Negroes, and Alexander Stephens Institute which was populated by whites during the last school term. It appears without dispute that Alexander Stephens Institute has been closed since the beginning of this school term on or about September 1st, and that all white children in Taliaferro

County are attending school in adjoining counties with most being transported on Taliaferro County school buses. The role that the school superintendent and the school board are alleged to have played in the conspiracy is to have secretly and covertly arranged for all the white children to leave the county for school in other counties so as to eliminate the only white school available to 87 Negro children who sought transfers to a desegregated school. The transfers were sought pursuant to a plan of desegregation filed with the Health, Education and Welfare Department. The transfer applications of these Negro students had never, up until the time of hearing, been considered by the superintendent and the school board. Instead, the school superintendent concluded that some of the applications for transfer were not bona fide and thereupon called upon the school board attorney, defendant Richards, to conduct an investigation as to whether some of the applications were forged . . .

At any rate, Mr. Richards took over the investigation from this point forward. And it must be noted in considering this phase of the case that the form of application for transfer was illegal in the light of several opinions of this court that notarization of the signature of the applicant or of the parents or guardian may not be required [citing cases].

Defendant Richards obtained what he considered to be sufficient evidence to have Plaintiff Calvin Turner, a former teacher in the Negro school of Taliaferro County, indicted for forgery. We view that evidence with considerable scepticism in the light of the illegal transfer applications and other evidence submitted at the hearing . . .

There was some evidence that the unrest on the part of the Negro plaintiffs stemmed in part from the fact that the superintendent of schools refused their request for a gymnasium or for use of the only school gymnasium in the county which was assigned to the white school. There was some evidence relating to the refusal to rehire several Negro school teachers but this was not developed to the point of showing that this resulted from the alleged conspiracy (255 F. Supp. at 727, 28).

The court determined that the white school superintendent "with at least the knowledge, if not the help, of the school board" (*Id.* at 728) knew that the white schools would be closed. Negroes, however, were not advised. The decision "if not kept secret, was at least not publicized" and "The superintendent arranged during the month of August for her own son to transfer" to a school in another county (*Ibid.*). Although Negro transfer applications had been refused, white applications to attend school in adjoining counties were granted and Taliaferro public school buses used to transport them (*Ibid.*).

In response to these facts, the court placed the school system in receivership and appointed the state superintendent of schools as receiver. He was instructed to submit a plan (i) to end the illegal expenditure of public funds use to transport whites to adjoining county schools and (ii) to grant the right of 87 Negro applicants for transfer to adjoining counties where white children had been transferred (*Id.* at 730). The solicitor, county sheriff and county attorney were enjoined from prosecuting Negroes including appellant Turner under "spurious"

indictments for disturbing divine worship, as well as on perjury and forgery charges. The court also enjoined plaintiffs from disturbing schools and interfering with school buses carrying students to adjoining counties (*Ibid.*).⁵ The formerly white school was ultimately reopened as an elementary school and the formerly Negro school as a high school (*Id.* at 731-34), but white children who had left the public schools of the county, rather than attend them on a desegregated basis, never returned. They either attended a newly created private school or continued to attend school in other counties (A. 47-9, 51-2, 354-59, 397).⁶

At this time, Negro parents believed that they could not alter continued operation of a segregated school system, and that the white school board, several of whose present members were also serving in 1965, was hostile to the needs and desires of the students actually attending the public schools (A. 214-217). Repeated attempts by appellant Turner and members of the Voters League, a civic group, to appear at school board meetings were unsuccessful. The time of scheduled meetings was changed without public notice, contrary to law (A. 343-47; *infra* pp. 5a, 6a).⁷

⁵ On May 20, 1966, the court entered a supplementary opinion in which it granted the receiver's motion for discharge after concluding that Negro children who wished to attend school in adjoining counties did so and that adjoining counties had given notice they would take no children, white or Negro, for the school term 1966-67. Administration of the schools was returned to the Taliaferro board of education.

⁶ During the 1966-67 term, there were 458 Negro children in the public school system and 72 white children attending a local private school.

⁷ At the second hearing, appellees admitted that timely notice of the schedule change had not been published but also alleged, through the introduction of hearsay evidence, that such failure was inadvertent (A. 345-346).

and the time also could not be determined despite attempts to obtain information from the board chairman (A. 188-90, 206-07). When reached by phone his attitude was brusque and unhelpful (A. 210-11). A registered letter sent to him went unanswered (A. 188-89).

One parent, Mrs. Mary Allen, told the district court her experience with the school system. She was invited to visit her child's classroom by the Negro principal. After the white superintendent observed Mrs. Allen in class, the classroom teacher was told by the principal: "Miss Hadden, discontinue this class until the parents (sic) leave" (A. 225). Mrs. Allen subsequently asked to be allowed to organize a parent-teacher association in order to "have some kind of communication with the teacher" (A. 229). The principal of the high school informed her that this could not be done because the superintendent had refused permission (*Ibid.*). When a group of parents attempted to appeal that decision, and present other grievances, the board abruptly adjourned a meeting without responding to any of the complaints. The course of the meeting was described at trial:

Judge Bell: How long did you stay in there?

The Witness: About ten minutes.

Judge Bell: And then they moved that meeting be adjourned?

The Witness: That's right, and put the heater out. They had the heater on and a gentleman put the heater out and we walked out. He started putting the lights out too and we walked out and then they closed the door.

Judge Bell: Did they give you an answer at all as to your complaints?

The Witness: No answer.

Judge Bell: No answer?

The Witness: No sir.

Judge Bell: Have you had one since then?

The Witness: No, sir" (A. 233).⁸

Mrs. Allen stated her opinion of the school system as follows:

"You can't even talk with the teacher, and can't go and sit in the classroom and can't talk to the board, can't talk to anybody, nothing about your problems" (A. 234).

Shortly after her experience with the school board she moved to another county for the benefit of her child. Her purpose in moving, she said, was "to get communication" (A. 234).

D. The Selection of Jurors

The challenged selection process for the grand jury and school board members begins when a judge of the Superior Court, elected by the voters of a six county circuit,⁹ appoints six jury commissioners from among "discreet persons" in the county for a six year term, Ga. Code Ann. §59-101. At least biennially, these commissioners compile from the official registered voter's list used at the last preceding election a jury list of "intelligent and upright citi-

⁸ At the first hearing Judge Bell stated: "... The court construes that paragraph of the petition to mean, based on the evidence, that the First Amendment has been suspended in Taliaferro County to the extent that citizens can't assemble before their officials and petition for their grievances. That's been the evidence" (A. 214-215).

⁹ Ga. Code Ann. §24-2501.

zens of the county." Ga. Code Ann., §59-106.¹⁰ While Georgia law permits 18 year olds to vote only persons over 21 are eligible for jury service, Ga. Code Ann., §59-201.

After compiling the jury list the commissioners select a "sufficient" number of the most "experienced, intelligent and upright citizens",¹¹ not exceeding two fifths of the whole, to serve as grand jurors.¹² The judge of the Superior Court draws from the grand jury list so selected not less than 18 nor more than 36 names to serve on a venire for the next term of court, and the sheriff summons the prospective jurors, Ga. Code Ann., §§59-203, 206. After excusals, a grand jury panel consisting of not less than 18 nor more than 23 persons is drawn from the venire (A. 311-314, 322), Ga. Code Ann., §59-202.¹³

¹⁰ §106 also provides that: "If at any time it appears to the jury commissioners that the jury list so composed, is not a fairly representative cross-section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly represented thereon."

¹¹ Prior to 1967, the commissioners were instructed to select as jurors upright and intelligent persons from the books of the Tax Receiver. Ga. Code Ann., §59-106 (superseded). The tax books from which the prospective jurors were selected were segregated by race. Ga. Code Ann. §92-6307. See *Whitus v. Georgia*, 385 U. S. 546, 549 (1967).

¹² The requirement that Grand Jurors be the most "experienced, intelligent and upright citizens" was added to the statute in 1968 subsequent to trial in this case.

¹³ Under Georgia law grand juries have a number of powers in addition to indictment and appointment of school board members. They may recommend that individual tax returns be corrected, Ga. Code Ann. §59-306; inspect the list of voters, Ga. Code Ann. §59-308 and the offices, papers, books and records of the

At the January 23, 1968 hearing evidence was introduced showing that on the jury list most recently composed, 56 out of a total of 328 traverse jurors (or 17%) were Negro (A. 182-83, 399), and 11 out of 130 on the grand jury list (or 8.5%) were Negro (*ibid.*). The district court concluded that systematic exclusion of Negroes was taking place and condemned the practice:

"We all know what systematic exclusion is, and when there is as many registered Negro voters in a county as whites and you have 130 to 11 on the grand jury, why that's systematic exclusion, and that will have to be corrected" (A. 251).

The court adjourned the hearing after informing defendants of the court's power to enjoin racial discrimination if a remedy were not devised (A. 251, 254-255, 399).

At the beginning of the February 23, 1968 hearing appellees' counsel presented a report to the district court which stated that on January 26, 1968, the judge of the Superior Court ordered the jury commissioners to revise

clerk of the Superior Court, the ordinary and the county treasurer or depository for conformance with their duties, Ga. Code Ann. §59-309. The jury may appoint citizens to inspect the affairs of the ordinary or other authority having charge of county affairs, the clerk of the Superior Court, county treasurer, tax collector, school superintendent, sheriff, and all other county offices, Ga. Code Ann. §59-310. Persons appointed by the grand jury to inspect have full power to take control of the various offices, to compel the attendance of witnesses, and hear evidence of fraud and the non-performance of official duty, Ga. Code Ann. §59-311. The jury is also obliged to inspect the sanitary conditions of jails and to make recommendations as to their proper operation, Ga. Code Ann. §59-314; to inspect all public buildings and property of the county and report their condition, Ga. Code Ann. §59-315; and to appoint a committee to inspect every orphanage, sanatorium, hospital, asylum, and similar facilities for the purpose of ascertaining what persons are confined and by what authority, Ga. Code Ann. §59-401.

both the grand and traverse jury lists "to comply with the oral pronouncement" of the district court (A. 266). This order was filed with the clerk of the Superior Court but not generally publicized. By word of mouth, however, some persons did hear of it and requested not to be put on the jury list (A. 280-81). Over forty whites but only two or three Negroes were not placed on the list as a result of such requests not to serve (A. 89, 402). Appellants' counsel objected to the report on the ground that it was hearsay and that neither he nor appellants had been informed of the revision or furnished with the report in advance of the hearing but the district court received it in evidence (A. 269-72; cf. 262).

According to the report the commissioners considered "each and every name" (A. 77, 266, 67), on a list of 2,152 registered voters. When they were not familiar with Negroes, they inquired of three Negroes who were "brought in to work with us in order to assist in excluding people from the list" (A. 275, 76). They consisted of an insurance agent, his daughter-in-law and a person who was employed by the board of education but whose position the chairman did not know. These Negroes were not, however, appointed jury commissioners (*Ibid*).

The Commission eliminated the following numbers of persons from the voters list for the reasons stated:

| | |
|--|-----|
| Poor health and over-age | 374 |
| Under 21 years of age | 79 |
| Dead | 93 |
| Persons who maintained Taliaferro County as a permanent place of residence but were most of the time away from the county | 514 |

| | |
|--|--------------|
| Persons who requested to be eliminated from consideration | 48 |
| Persons about whom information could not be obtained | 225 |
| Persons of both the white and Negro race who were rejected by the Jury Commis- sioners as not conforming to the statu- tory qualifications for juries either be- cause of their being unintelligent or because of their not being upright citizens | 178 |
| Names on voters lists more than once | 33 |
| Total | 1,544 |

(A. 77-78, 267).

These disqualifications left 608 names on the list. The commissioners determined that fewer than 608 names were needed, alphabetized the remaining names, and discarded every other one. Of the 304 persons on the list, 113 (37%) were Negro and 191 (63%) were white (A. 78, 267). From the 304 they drew 121 names by lot and put those names on the grand jury list (A. 78, 268). Forty-four (36%) of 121 persons on this list were Negroes (A. 79, 268). Of 32 persons initially drawn from this list for the grand jury, 9 (or 28%) were Negro. Of the 23 persons actually selected to serve on the grand jury, 6 (or 26%) were Negro (A. 79, 268-69).¹⁴

¹⁴ The judge begins with the first name on the list of 32 and hears requests for excuses. After persons granted excuses are eliminated, he chooses the first 23 names on the list (A. 322).

Two months after the February 23, 1968 hearing, the jury commissioners reported additional information concerning the revision to the district court and corrected errors in earlier figures furnished. They found that 2,252 names, instead of 2,152, were on the voters list and that eliminations were made for the following reasons:

| <i>Category</i> | <i>Total Number of Names</i> | <i>Negro Names</i> |
|---|----------------------------------|------------------------|
| Under 21 | 81 | 71 |
| Dead | 94 | Unknown |
| Requested | 43 | 2 |
| No Information | 226 | Unknown |
| Poor health and/or old age | 482 | 191 |
| Away | 533 | 263 |
| Miscellaneous | 179 | 167 |
| Elected Officials and then Known Duplications | 8 | -0- |
| Not Alternately Selected | 302 | 106 |
| | | (A. 89). |

The district court only partially accepted the fact stated in this report. The court found that 171 of the 178 persons excluded by reason of character and intelligence (as opposed to 167 of 179) were Negro and that 3 of 43 persons excluded by request (as opposed to 2 of 43) were Negro (A. 402; cf. 89).

The commission chairman testified concerning the revision. When asked what was meant by the standard of "intelligent," the chairman first stated it would be someone capable of interpreting proceedings in the courtroom but then that the standard used was whether persons could

read or write (A. 283). He later testified: "... we made the overall consideration of uprightness in people who were dependent and reliable and honest. We did not say pick out so and so and say they were unintelligent" (A. 284). He also testified that an "upright" citizen was one who had a "good reputation, people who were honest and of good character" (A. 284). While some persons were omitted from the list because they had a criminal record the Chairman had no idea of the number or the offenses which constituted grounds for exclusion (A. 285). For example, he did not know whether any persons were found to lack a sufficiently upright character because of having been convicted of a traffic violation (A. 287).

E. Selection and Duties of School Board Members

Under Georgia law, the county grand jury selects as school board members five freeholders "of good moral character, who shall have at least a fair knowledge of the elementary branches of an English education and be favorable to the common school system", Ga. Code Ann. §§32-902.1, 903. The operation of this system is statewide, except in those counties altering it "by local or special law conditioned upon approval by a majority of the qualified voters of the county voting in a referendum thereon," Ga. Code Ann. §2-6802. Approximately 94 of Georgia's school boards are chosen by county grand jury, *Atlanta Journal*, p. 7-A (Feb. 2, 1969). Each member is elected for a four year term, Ga. Code Ann. §2-6801; §32-902, but the board fills vacancies, other than which result from expiration of a term, until the next grand jury meeting, at which a successor is chosen, Ga. Code Ann. §2-6801.

The board is required to meet between the 1st and the 15th of each month at the county seat for the transaction of business pertaining to the public schools. Ga. Code Ann. §32-908 provides that the board "shall annually determine the date of the meeting" and shall "publish same in the official organ for two consecutive weeks following the setting of said date; Provided further that said date shall not be changed oftener than once in twelve months."

The Georgia grand jury selection method is unusual. A 1949 study concluded that the prevailing method of selection in the United States is by public vote. While several states where the county is the basic unit of government, have appointive boards (by the Governor in Maryland; the General Assembly in North Carolina; School Trustee Electoral Boards in Virginia; and County Courts in some counties in Tennessee) Georgia was apparently the only state where appointment was by the grand jury. *The Forty-Eight State School Systems* (Council of State Governments, 1949), pg. 59, Table 23, p. 196. A more recent survey of 477 school boards of various sizes and locations revealed that 82.2% were elected. See Circular No. 6, Nov. 1967, Educational Research Service (Washington, D. C.).

At the January 23, 1968 hearing in the district court the presiding judge remarked that the absence of Negroes on the board of education "simply will not do" and stated pointedly that it would be wise if the school board filled its vacancies with "two outstanding Negroes . . . if you don't want to do that we will know that on the 23rd [of February]" (A. 252). Two vacancies existed on the school board at the time of the hearing. The superintendent of schools attended the hearing and upon her return informed the school board of the presiding judge's remarks (A. 350,

351).¹⁵ Two days later, the county board of education met and appointed one Negro and one white to the board. Shortly thereafter these choices were ratified by the grand jury (A. 268, 339)—apparently without the public notice required by law (A. 348-349, 351). No Negroes attended the meeting at which the Negro board member was selected although Negroes had attended board meetings in the past (A. 347-348). Nor did the board discuss the qualifications of Casper Evans, the new Negro member, for board membership (A. 351-52). He was “put in nomination and elected” (A. 353). No effort was made to give notice of the appointment meeting to any parent or the plaintiffs in this suit (A. 348, 353).

Appellant Turner testified that Mr. Evans was a distant relative of his who was about 71 or 72 years of age and retired (A. 374). Mr. Evans had only attended school to the third or fourth grade (A. 375) and had often stated that he did not feel like going out in public any more or to attend community meetings, because of his age (A. 374-75). Turner believed that Evans was unrepresentative of the Negro community (A. 381, 385), and that if Negroes had been afforded an opportunity to choose, they would have selected someone far more qualified educationally, and otherwise, to serve (A. 385).¹⁶

¹⁵ When the superintendent was asked what efforts she had made to keep the public school system from becoming all Negro she replied that “the schools are open to all the children of Taliaferro County” (A. 355-56).

¹⁶ He stated: “Mr. Casper Evans was taken from the lower bracket, the very lowest bracket of those persons who have attained a education” (A. 387). “I submit, said Mr. Turner, the people in that community . . . knew nothing about the election of Mr. Evans, and . . . this certainly wouldn’t be the democratic process” (A. 381).

Summary of Argument

I.

Georgia confers an opportunity for arbitrary and discriminatory jury selection on jury commissioners by authorizing them to exclude persons they do not believe are "intelligent and upright" citizens. Neither Ga. Code Ann. §59-106, nor the practice of the all-white Taliaferro County commission, supplies a meaningful definition of the statutory language. Vague standards have often been condemned in other spheres of governmental activity precisely because of their tendency to vest this sort of undue discretion in officials to deprive citizens of their constitutional rights. Requirements of specificity are at least as necessary to a juror selection system, for although blatant acts of discriminatory exclusion may be prevented by injunction, the more subtle forms of the evil, such as discriminatory limitations of the number of Negro jurors, will survive as long as Negroes can be declared ineligible on the basis of subjective and intangible character judgments. (In this case the opportunity to discriminate was employed by exclusion of 171 Negroes and only 7 whites as not being "intelligent and upright".) The necessity of striking Georgia's vague selection standards for grand jurors is heightened by the fact that the grand jury selects members of the county school board—a circumstance which has resulted in the exclusion of Negroes from board membership in a county where all the public school children are Negro.

II.

Georgia law authorizes a multi-layered scheme of selection of school board members which has resulted in the virtual exclusion of Negroes from board membership. Limitations on the right of Negroes to participate in the selection of officials "who control the local county matters that intimately touch [their] lives," *Terry v. Adams*, 345 U. S. 461, 470 (1953), violate the Constitution. When such limitations dilute the weight of Negro votes they may be redressed according to the standards of *Reynolds v. Sims*, 377 U. S. 533 (1964), but other remedies, reflecting the special need of Negroes to unimpaired political rights, may also be employed. In Taliaferro County, dilution of the power of Negroes to elect school board members has resulted in a segregated school system and in making the Negroes virtually subject to the commands of the whites in regard to the education of their children. The district court erred by not declaring a school board selection system which so operates unconstitutional and by failing to consider relief which would eliminate diminution of Negro voting power for school board members.

III.

Georgia's constitutional and statutory requirement that county school board members must be freeholders violates the Equal Protection Clause of the Fourteenth Amendment for it discriminates against the poor and landless far more than the poll tax condemned in *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966). The freeholder restriction reflects an obsolete view of the attributes of real

property ownership, it bears no reasonable relationship to any legitimate governmental objective, and it retards citizen participation in what may be the most important unit of local government. While the mischief caused by such a prohibition is plain, Georgia has not suggested any "compelling interest" in the prohibition of non-freeholders from board membership which would begin to meet the exacting standards of equal protection applied when the right to vote is involved.

ARGUMENT

I.

Statutory Standards Which Govern Georgia Jury Selection Are Unconstitutionally Vague and Permit Exclusion of Negroes From Jury Service in Violation of the Fourteenth Amendment to the Constitution of the United States.

In *Whitus v. Georgia*, 385 U. S. 545, 552 (1967) this Court condemned Georgia statutes which injected race into the selection of jurymen because they provided an "opportunity to discriminate," see also *Sims v. Georgia*, 389 U. S. 404 (1967); *Cobb v. Georgia*, 389 U. S. 12 (1967); *Jones v. Georgia*, 389 U. S. 24 (1967); *Anderson v. Georgia*, 390 U. S. 206 (1968); *Sullivan v. Georgia*, 390 U. S. 410 (1968); *Bostick v. South Carolina*, 386 U. S. 479 (1967). In 1967, the Georgia legislature changed the source of prospective jurors from racially designated tax digests to voter lists, but retained the "opportunity to discriminate" condemned in *Whitus*, *supra*, by reenacting the vague and subjective character "standards" of juror eligibility challenged here

that all jurors be "intelligent and upright".¹⁷ In addition, the "opportunity" for racial selection inherent in this statutory language was "resorted to" (385 U. S. at 552) by Taliaferro County jury commissioners, both before and after this litigation commenced, a circumstance entitled to considerable weight in considering the constitutionality of the challenged statutory scheme, *Louisiana v. United States*, 380 U. S. 145 (1965); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Hague v. C. I. O.*, 307 U. S. 496 (1939); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886). Although the number of white and Negro voters in the county is equal, until suit was filed only 11 of the 130 persons on the grand jury list were Negro (A. 399) and during the court-ordered revision of the jury list, approximately 96% (171 out of 178) of the persons disqualified by the commissioners as not "intelligent and upright citizens" were Negro (A. 402). It is apparent that the vagueness of the challenged provisions at the very least serves as a convenient mask for what is plainly racial discrimination.

Georgia law creates several levels in the jury selection process at which virtually unlimited discretion is delegated to persons possessing appointive powers. First, the judge of the Superior Court, an official elected by the voters of six counties, is authorized to appoint as county jury commissioners anyone he deems to be "discreet", Ga. Code Ann. §59-101. Although Negroes constitute a majority of the county population, all the "discreet" persons selected by Superior Court judges to be jury commission-

¹⁷ In 1968, the Legislature amended Ga. Code Ann. §59-106 to require that grand jurors be "the most experienced, intelligent and upright citizens" of those chosen as jurors.

ers over the years have been white. Second, the discretion of the jury commissioners is such that they may disqualify from service as jurors anyone they find not to be an "intelligent and upright citizen" and anyone for grand jury service who is not among "the most experienced, intelligent and upright", Ga. Code Ann., §59-106. Section 106 also provides that if at any time "*it appears to the jury commissioners*" that the jury list is not a fairly representative cross-section of the "*intelligent and upright citizens*" of the county, they shall supplement the list by "going out into the county and personally acquainting themselves with other citizens of the county, *including intelligent and upright citizens* of any significantly identifiable group in the county which may not be fairly represented thereon." (Emphasis supplied.) Thus the statute first provides the jury commissioners with "the opportunity to discriminate"; then charges the very same persons with the power to determine by use of the same subjective standard whether in fact the opportunity "was resorted to" (*Whitus, supra*, 385 U. S. 552) and should be remedied.¹⁸

The Taliaferro jury commissioners concede that eligibility under §106 is determined by their "personal" opinion. When asked to "describe in full and complete detail the standards applied" the commissioners responded by denying the existence of uniform criteria defining "intelligent and upright":

¹⁸ The language of Ga. Code Ann. §59-106 instructing the jury commissioners to find additional jurors from readily identifiable groups is less of a *caveat* than a camouflage. As long as "intelligent and upright" remains a part of the jury selection statute, the jury commissioners will have a built-in excuse for failing to include Negro citizens on the juries.

We did not detail or fix any standards in making a determination as to who is upright and intelligent. As previously stated, this determination is based upon our knowledge either personal or through investigation of these persons being considered (A. 36).

When asked to state "in full and complete detail, the procedures followed in selecting persons for the grand jury list" the commissioners stated that there "was no set procedure for this selection process":

From the official registered voters list which was used in the last preceding general election, as a group we selected a fairly representative cross-section of the upright and intelligent citizens of the county. There was no set procedure for this selection process. We did it as a group (A. 36).

The manner in which the commissioners confronted their constitutional and statutory duty to select a cross-section of the community is illustrated by the fact that until after the court-ordered revision of the illegal jury lists the commissioners professed total ignorance as to whether discernible groups in the community were represented:

Q. 6. How many members of the present grand jury list are members of the Negro race? A. 6. We do not know.

Q. 7. How many members of the present grand jury list are white females? A. 7. We do not know.

Q. 8. How many members of the present grand jury list are Negro females? A. 8. We do not know.

.

Q. 17. Of the names on the voter's list, how many are Negroes? A. 17. We do not know.

Q. 18. Of the names on the voter's list, how many are white females? A. 18. We do not know.

Q. 19. Of the names on the voter's list, how many are Negro females? A. We do not know (A. 30-32, 36, 37).

Even after the revision process was completed, the commission had not formulated standards of selection to make the vague language of §106 more precise. The chairman testified, for example, that an "upright citizen" was one who had a "good reputation in the community, good character" (A. 284). As to the term "intelligent", he presented totally inconsistent definitions. First, he defined the intelligent as:

People who we thought would be capable of interpreting proceedings that would be going on in the courtroom (A. 283).

But we asked "what standards did you use," he replied:

People that could not read nor write to our knowledge. I don't think we rejected anyone because you say they are unintelligent. I mean that—

Judge Bell: You said awhile ago being able to understand proceedings in court.

The Witness: Yes sir, and we made the overall consideration of uprightness and people who were dependent and reliable and honest. We did not say pick out so and so and say they were unintelligent.

Judge Bell: In other words, you measured these people by the standard as to whether or not they were

capable of serving on a jury and understand what the duty of a juror was?

The Witness: That's right, sir (A. 284).

This jury selection scheme—as authorized by Georgia law and employed by the Taliaferro County Commissioners—violates appellants' rights under the Fourteenth Amendment. *First*. As is true with racial discrimination in voting¹⁹ (an analogy especially pertinent here in light of the dual role of the grand jury system see *supra* p. 20), excessive discretion in the hands of local officials thwarts nonracial selection of prospective jurors. Judge Kaufman merely summarized what is generally recognized when he told a United States Senate Committee that:

“... long experience with subjective requirements such as ‘intelligence’ and ‘common sense’ has demonstrated beyond doubt that these vague terms provide a fertile ground for discrimination and arbitrariness, even when the jury officials act in good faith.”²⁰

One study of jury selection procedures has concluded that until character tests are replaced by objective standards non-racial selection is unlikely: “It is this broad discretion located in a non-judicial officer which provides the source of discrimination in the selection of juries.” The Congress,

¹⁹ Condemnation of discretion in the hands of state voting officials is the heart of recent decisions of the Court. See *United States v. Mississippi*, 380 U. S. 128 (1965); *Louisiana v. United States*, 380 U. S. 145 (1965).

²⁰ Statement of Hon. Irving R. Kaufman, *Hearings on S. 1318 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. at 251 (1967). See also Kuhn, “Jury Discrimination: The Next Phase,” 41 U. S. C. Law Rev. 235, 266-82 (1968).

The Court and Jury Selection, 52 Va. L. Rev., 1069, 1078 (1966); see also *Rabinowitz v. United States*, 366 F. 2d 34 (5th Cir. en banc 1966).²¹

Second. While character tests such as those contained in §106 provide a ready opportunity for racial selection, their "indefiniteness . . . makes it most difficult to prove that rejection of an eligible juror was the product not of honest opinion but of racial policy" Kuhn, op. cit. p. 271. Opinions of uprightness and intelligence primarily depend on the individual making the judgment. Thus, a commission bent on racial discrimination may do so without check as long as it is satisfied with limiting the number of Negroes serving rather than excluding them totally.

Third. Even the fair minded commission is likely to be misled by the shifting and subjective nature of character standards into racial or other arbitrary selection. The Fourth Circuit made this point forcefully when considering a Virginia statutory scheme similar to that involved in this case:

It should not surprise anyone that an all-white jury commission guided by a white judge would be unlikely to find as high proportion of the Negro community to be "best qualified" as found among white people. It is a simple truth of human nature that we usually find the "best" people in our own image, including,

²¹ In recognition of the dangers of subjective selection standards, Congress passed the 1968 Jury Selection and Service Act, Pub. L. No. 90-273, 28 U. S. C. §§1861 et seq., abandoning the "key man" system in favor of "random selections" and "objective criteria only" in determining juror qualifications. See House Report, No. 1076, Feb. 6, 1968 (to accompany S. 989) set out in U. S. Code Congressional and Administrative News, 90th Cong. 2nd Sess. pp. 748-63.

unfortunately, our own pigmentation. But the danger is not simply subjective. As a practical matter, in a society that is still largely segregated, at least socially, it is obviously true that white people do not generally have the wide acquaintance among Negroes that they have among other white people. A failure of either the judge or the commissioners fully to acquaint themselves with all those eligible for jury duty can just as effectively result in racial discrimination as would conscious and deliberate invidious selection. Indeed, within the meaning of the Equal Protection Clause, such a failure has been equated with deliberate and purposeful discrimination. *Hill v. Texas*, 316 U. S. 400, 404 (1942).

Achievement of the stated purpose of the judge and the jury commissioners to get only the "best qualified people" was not aided by the existence of any objective standard that might have been readily applied. The only direction given by the legislature to the judge in that regard is that he select from the citizens of each county "persons 21 years of age and upwards, of honesty, intelligence and good demeanor and suitable in all respects to serve as grand jurors * * *". These are qualities hard to judge. The standards applied by the jury commissioners were, according to the oath subscribed by them, no more definite: "We will select none but persons whom we believe to be of good repute for intelligence and honesty" Standards such as these afford but little guidance to the conscientious judge and jury commissioner. It is not unnatural that each may be left with the feeling that he has discharged his duty when he has subjectively selected the "best folks" known to him.

Selection of jurors "must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. (*Witcher v. Peyton*, 405 F. 2d 725, 727 (4th Cir., 1969))

Finally, there is an evil inherent in vague character and intelligence eligibility standards which is no less significant for it being difficult to prove in any particular case. It is that "commissioners can easily select only those Negroes who behave as Negroes are meant to behave in their contacts with white society—Negroes who 'know their place.' Indeed, it is only natural for southern jury officials to find lacking in 'judgment' and 'character' those Negroes who engage in civil rights activities, who 'talk back' to white employers, or who have hung juries in previous cases with racial significance. The usual statutory criteria readily lend themselves to selection only of 'safe' Negroes who will do what is expected of them in the jury room. The jury commissioners may consciously exclude all but 'Uncle Toms,' or they may in good faith simply regard other

Negroes as lacking in the qualities required of good jurors." (Kuhn, *op. cit.* at p. 271).

It is settled, however, that officials may not be empowered to dispense or deny important constitutional rights in the exercise of a discretion which consists solely of their own judgment, unguided by statutory or other guidelines. In other spheres of governmental activity this Court has declared similar language permitting public officials to make subjective decisions unconstitutional.²² Dealing with voting qualifications imposed by South Carolina law, similar to those involved here for jury service, this Court declared in *South Carolina v. Katzenbach*, 383 U. S. 301, 312-13 (1966):

"... the good morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials."

Requirements of specificity are at least as necessary in a selection system for jurors. "[E]xclusion from jury

²² "Unreasonable charges" *United States v. L. Cohen Grocery Co.*, 255 U. S. 81 (1921); "unreasonable profits" *Cline v. Frink Dairy Co.*, 274 U. S. 445 (1927); "reasonable time" *Herndon v. Lowry*, 301 U. S. 242 (1937); "sacrilegious" *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952); "so massed as to become vehicles for excitement" (a limiting interpretation of "indecent or obscene") *Winters v. New York*, 333 U. S. 507 (1948); "immoral" *Commercial Pictures Corp. v. Regents of University of New York* reported with *Superior Films, Inc. v. Department of Education*, 364 U. S. 587 (1954); "an act likely to produce violence" in *Edwards v. South Carolina*, 373 U. S. 229 (1963); "subversive person" in *Baggett v. Bullitt*, 377 U. S. 360 (1964); "reprehensive in some respect"; "improper"; and outrageous to "morality and justice" *Giacco v. Pennsylvania*, 383 U. S. 339 (1966). See also *Staub v. City of Baxley*, 355 U. S. 313 (1958); *Louisiana v. United States*, 380 U. S. 145, 153 (1965); *United States v. Atkins*, 323 F. 2d 733, 742-743 (5th Cir. 1963); *Davis v. Schnell*, 81 F. Supp. 872 (S. D. Ala.) *aff'd per curiam*, 336 U. S. 933 (1949); *Board of Supervisors v. Ludley*, 252 F. 2d 373, 74 (5th Cir. 1958).

service . . . is at war with our basic concepts of a democratic society and a representative government". *Smith v. Texas*, 311 U. S. 128, 130 (1940). And when, in addition, the electoral function of the Georgia grand jury is considered (see *supra* p. 20), the denial of Fourteenth Amendment rights by conferral of excessive discretion in the jury commissioners is plain. There is simply no reason for the State of Georgia to require that grand jurors who may vote in its school board elections be "intelligent and upright" when persons who vote in general elections must meet no such standard. The school board "voter registrars", who in Georgia happen to be jury commissioners, have "virtually uncontrolled discretion as to who should vote and who should not." *Louisiana v. United States*, 380 U. S. 145, 150 (1965). In that case, this Court sustained a lower court decision holding the state's voter qualification test, which required the prospective voter to interpret portions of the Louisiana or United States Constitutions, invalid *on its face* and as applied, under the Fourteenth and Fifteenth Amendments. Basic to the Court's holding was the fact that the test "imposed no definite and objective standards" upon the registrars who were charged with administering it. (380 U. S. at 152)

Appellants do not contend that the state can set no standards at all as qualifications for jurors (or school board electors) but qualifications that the state sets must be compatible with federal constitutional requirements. As the record in this case amply demonstrates, there is no question but that the present indefinite and non-objective standards permit an extraordinary denial of equal protection: in a county where Negroes are more than 60 percent of the population and 50 percent of the

voters, they make up a disproportionate minority of grand jurors. By manipulation of the standardless and unreviewable discretion which Georgia has delegated to jury commissioners, Negroes have been rendered a minority of the school board electors as surely as though they had been gerrymandered out of the county. *Cf. Gomillion v. Lightfoot*, 364 U. S. 339 (1960).

General injunctions against racial exclusion such as granted by the district court may be sufficient to prevent blatant acts of discrimination such as existed prior to institution of this litigation, but subtler forms will survive as long as tools such as character tests which measure intangibles remain readily available. At the first hearing in this case, the district court, in effect, ordered recomposition of the county jury lists on a non-discriminatory basis. While the result was an increase in the absolute number of Negroes selected, an overwhelming proportion (about 96%) of those excluded by the all-white commissioners during the revision as not "intelligent and upright citizens" were Negro. Thus, under the existing statutory scheme it may well be possible to eliminate near total exclusion, but not the racial *limitation* of Negroes from the jury rolls. It is not, however, only exclusion but limitation on the basis of race as well which the Constitution prohibits: "Discriminations against a race by barring or limiting citizens of that race from participation in jury service are odious to our thought and our Constitution" (emphasis added).²³ *Brown v. Allen*, 344 U. S.

²³ That an unconstitutional *limitation* of Negroes has taken place in Taliaferro County is shown by the fact that in compiling a new list of jurors, the jury commissioners had 304 names (113 Negroes or 37% ; 191 whites or 63%) remaining after randomly discarding half the registered voters not disqualified. One of the

433, 470-471 (1953) citing *Brunson v. North Carolina*, 333 U. S. 851 (1948); *Cassell v. Texas*, 339 U. S. 282, 286, 287 (1950).

It may well be that Taliaferro jury commissioners truly believe that of all the registered voters who are by reason of faulty intelligence or character ineligible to serve as jurors, 96% are Negroes. They cannot be enjoined from that belief. It is possible, however, for them to be prohibited from bringing such opinions, similar to those branded a "violent presumption" in *Neal v. Delaware*, 103 U. S. 370, 397 (1881), to bear upon decisions as to who should be selected as jurors. As was true in *Louisiana v. United States*, "the vice cannot be cured by an injunction enjoining its unfair application" 380 U. S. 145, 150 n. 9 (1965), but only by prohibiting the use of a vague and subjective standard.

statutory standards of disqualification, the character and intelligence test, in effect, operated to exclude Negroes only: the district court found that of the 178 persons excluded, 171 were Negro. Thus prior to application of the character test there was approximately a 50-50 percentage breakdown reflected on the lists if we assume that the random number discarded merely halved the numbers of the whites and Negroes of the initial list. As of all those disqualified by the test, 96% were Negro, the result of the test's application was to reduce the Negro representation of the revised list from approximately 50% (the proportion of Negro voters) to 37%.

II.

Georgia Constitutional and Statutory Provisions for Selection of School Board Members Operate in Taliaferro County to Dilute Negro Participation in the Selection of Board Members in Violation of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States.

Although Negroes constitute about 60% of the residents and 50% of the registered voters in Taliaferro County, they long have been virtually excluded from jury service. Even after the district court found a blatant and long-standing disregard of Negroes' constitutional rights, the revised jury list contained disproportionately few Negroes:

| | |
|-------------------|-----|
| 113 Negroes | 37% |
| 191 Whites | 63% |

The new grand jury chosen from this list contained even fewer:

| | |
|-----------------|-----|
| 6 Negroes | 26% |
| 17 Whites | 74% |

Because the grand jury selects the county school board, Negroes have been consistently excluded from board membership despite the fact that, since 1965, the public schools have been attended and staffed solely by Negroes, whites having sent their children to private school or to public schools in other counties to avoid desegregation. And while the first Negro was selected to fill a vacancy on the five member board before the second hearing in this case,

this was done only after the district court strongly implied that the court would act if Negro exclusion from the board continued.

Appellants contend in Argument I, *supra*, that the jury list, as revised, violates the Fourteenth Amendment because it was compiled pursuant to unconstitutionally vague statutory provisions which provide an undue opportunity to discriminate on the basis of race. Independent of appellants' contentions in this respect, however, the use of the grand jury to select school board members in Taliaferro County violates the Thirteenth, Fourteenth and Fifteenth Amendments because Georgia has adopted a method of selection which operates to dilute the political influence of Negro citizens. Even if equality of representation is not required in selecting jurors who have no political function, stricter standards apply here for two reasons: (1) "the theme of the Constitution is equality among citizens in the exercise of their political rights"²⁴ and the Georgia grand jury exercises political power by reason of its selection of school board members; and (2) The Thirteenth, Fourteenth and Fifteenth Amendments were intended to prohibit diminution of the voting power of Negroes, the very turning of "Negro majorities into minorities" *Sims v. Baggett*, 247 F. Supp. 96, 109 (M. D. Ala. 1965) which has occurred here.

That the system of selection of board members involved does not provide for direct election does not diminish the rights of Negroes to be afforded full and equal participation in it. *Sailors v. Board of Education of Kent County*,

²⁴ *MacDougall v. Green*, 335 U. S. 281, 290 (1948) (Mr. Justice Douglas dissenting) cited with approval in *Reynolds v. Sims*, 377 U. S. 533, 564 n. 41 (1964).

387 U. S. 105 (1967) illustrates the principle that the right of states to regulate their political subdivisions may not validate racial discrimination. There selection of school officials was held not subject to "one man, one vote" requirements, the latter being subordinate to the right of states to use appointive, non-representative, methods for choosing administrative officials. But this Court was careful to distinguish racial discrimination in the political process from the *Sailors* holding (387 U. S. at 108-109):

A State cannot, of course, manipulate its political subdivisions so as to defeat a federally protected right, as for example, by realigning political subdivisions so as to deny a person his vote because of race. [footnote omitted] *Gomillion v. Lightfoot*, 364 U. S. 339, 345.

Certainly this exception to the *Sailors* rule prohibits state action to dilute the influence of Negroes in the class of citizens choosing, appointing or electing members of a political body.²⁵ Cf. *Hadnott v. Amos*, — U. S. —, 37 U. S. L. Week 4256 (March 25, 1969).

Unconstitutional dilution of the Negro vote in Taliaferro County is established under the standards of *Reynolds v.*

²⁵ It can hardly be argued that the policy of the Thirteenth, Fourteenth, and Fifteenth Amendments contemplates permissible exclusions of Negroes from a political process merely because the particular form of selection involved is not a general election. The primary purpose of those Amendments, recognized in numerous decisions of this Court, see *Shelley v. Kraemer*, 334 U. S. 1, 23 (1948) and cases cited in footnote 30; *Nixon v. Herndon*, 273 U. S. 536, 540-41 (1927) is to undo the effects of slavery upon the civil rights of the Negro race. That purpose is subverted by permitting exclusion of Negroes from *any* political process, whether or not a regular election.

Sims, 377 U. S. 533 (1964).²⁶ For years, Negroes have accounted for virtually none of the electorate of grand jurors, and they accounted for only 26% of the most recent jury.²⁷ In *Reynolds*, 25.1% of the population could elect 50% of the state senate, and 25.7% could elect half the state house of representatives (377 U. S. at 545). Here whites, with 50% of the voters have 74% of the electoral strength, almost the same percentage gap as in *Reynolds*. In *Davis v. Mann*, 377 U. S. 678, 688-89 (1964), the disparity between population and voting strength was less than 10% with regard to both houses of the state legislature. In *WMCA v. Lomenzo*, 377 U. S. 633, 647 (1964) the disparity was 16.3% with regard to one house and 8.2% as to the other.

But neither the rights asserted, nor the remedies to which appellants are entitled, need rest on *Reynolds v. Sims*, *supra*, and *Baker v. Carr*, 369 U. S. 186 (1962).²⁸

²⁶ Vote dilutions also appear to be prohibited under §2 of the Voting Rights Act of 1965 which bans any "practice or procedure . . . imposed . . . by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color" (emphasis added). See *Allen v. State Board of Elections*, — U. S. —, 37 U. S. L. Week 4168, 73 (March 3, 1969).

²⁷ Although a random selection system accounted for a drop from an original representation of 37% on the jury lists to the 26% figure on the panel, the latter is determinative. Nothing in *Reynolds* indicates that states have the right by a random selection process to dilute votes. Even though that same process may at some future time result in a higher proportional representation, *Reynolds*, does not stand for the proposition that occasional vote dilutions are more constitutional than unvarying ones.

²⁸ Diminishment of the effectiveness of Negro votes by use of the gerrymander was condemned in *Gomillion v. Lightfoot*, 364 U. S. 339 (1960) while *Colegrove v. Green*, 328 U. S. 549 (1946) still appeared to prohibit judicial intervention in disputes alleging non-racial vote dilutions. Mr. Justice Frankfurter, writing ma-

These cases merely extend the long established willingness of the Court to overturn state political processes which discriminate against Negroes to devices which discriminate against persons who are not members of a racial minority. It is possible—indeed, it is exceedingly simple—to burden the franchise in a racially discriminatory manner while insuring that individuals, whether black or white, account for the same fractional share of a representative's constituency as every other voter. Thus, in *Sims v. Baggett*, the harm done by aggregating Negro and white counties was the diminution "of the Negro voting power" and the turning of "Negro majorities into minorities" 247 F. Supp. at 109; see also *Smith v. Paris*, 257 F. Supp. 901 (M. D. Ala. N. D. 1966) affirmed 386 F. 2d 979 (5th Cir. 1967); *Gomillion v. Lightfoot*, 364 U. S. 339 (1960); *Hadnott v. Amos*, — U. S. —, 37 U. S. L. Week 4256 (March 25, 1969). The national objective of eradicating voting discriminations against Negroes is an affirmative and specific constitutional pledge which antedates "one man, one vote" and is in no sense limited by it, as demonstrated by the fact that reapportionment law is limited to a defined class of elections, *Sailors v. Board of Education of Kent County*, 387 U. S. 105 (1967) while constitutional prohibitions of racial discrimination include "any [election] . . . in which public issues are decided or public officials selected," *Terry v. Adams*, 345 U. S. 461, 468 (1953) (Mr. Justice Black.

jority opinions in both, found no inconsistency between the two results, for it was almost 100 years ago that the Fifteenth Amendment established as national policy the doctrine that the right of Negroes not to be denied the franchise could not be "indirectly denied." *Smith v. Allwright*, 321 U. S. 649, 664 (1944). See also *Lane v. Wilson*, 307 U. S. 268 (1939); *Paris v. Schnell*, 336 U. S. 933 (1949).

concurring); *Hadnott v. Amos*, — U. S. —, 37 U. S. L. Week 4256 (March 25, 1969).²⁹

In Taliaferro County, the method for selection of school board members prevents Negroes from effectively influencing the choice of officials whose decisions critically affect their lives and those of their children. The effect of the system of selection is to render Negroes a minority of

²⁹ All three Civil War Amendments had as their central purpose the eradication of the last vestiges of slavery. See *Harper v. Virginia Board of Elections*, 383 U. S. 663, 682, n. 3 (1966) (dissenting opinion of Mr. Justice Harlan); *Shelley v. Kraemer*, 334 U. S. 1, 23 (1948); *Slaughter House Cases*, 83 U. S. 36, 81 (1873). Because the "peculiar institution" was ground so firmly in the Negro's political subordination to whites, constructions of the Fifteenth Amendment have often recognized the right of Negroes to more than abstract voting privileges, and cases such as *Gomillion v. Lightfoot*, *supra*; *Terry v. Adams*, *supra*; *Lane v. Wilson*, *supra*; see also *Rice v. Elmore*, 165 F. 2d 387 (4th Cir. 1948) all stand for the proposition that possession of the right to vote by Negroes is meaningless unless that right can be effectively used to gain a share of influence over the administration of vital community affairs. As stated in *Rice*, *supra*, at 165 F. 2d at 393 (cited with approval in *Terry*, *supra*, at 345 U. S. 466):

no election machinery can be upheld if its purpose or effect is to deny to the Negro, on account of his race or color, *any effective voice in the government* of his county or the state or community where he lives (emphasis added).

This Court has recently held that burdens upon the ability of Negro candidates to be elected violate the Fifteenth Amendment because they deprive Negro voters of the right "to cast their votes effectively," *Hadnott v. Amos*, 37 LW 4256, 57 (1969). Thus, the Civil War Amendments are concerned with more than the simple abstract right to vote. The protection of voting is one means toward the achievement of what is necessarily the larger goal of preserving the ability of Negroes to engage the political process effectively in the protection and establishment of their freedom. Votes alone are insignificant unless they are permitted to work toward that objective, and dilutions are to be measured not merely by their effect to diminish the weight of votes, but by their effect to dilute the capacity of those votes to achieve their underlying objective, namely the eradication of the remnants of slavery.

those who select board members, thus jeopardizing their right to a desegregated school system, and conferring control of the schools on those who have no interest in educational quality, and whose hostility to Negroes in the county is a matter of record. The evil is not diminished because *all* Negroes have not been precluded from participation in the selection process. "(D)ilution of Negro voting power . . . is just as discriminatory as complete disfranchisement or total segregation." *Sims v. Baggett*, 247 F. Supp. 96, 109 (M. D. Ala. 1965). Nor is the injury to appellants lessened by the fact that a Negro was finally put on the school board after the first hearing in this cause. The evidence suggests that this was a token appointment by the grand jury under pressure of this lawsuit. The selection was without public notice, contrary to state law, and there was evidence that the person chosen was infirm, and not representative of the Negro community, see *supra* pp. 21, 22. In any case, the essence of appellants' claim is that they, and the class they represent, are limited in their power of *choosing* board members; that claim is in no way weakened by the fact that the school board *might* have appointed someone who also *might* have been chosen if the Negro community had the electoral power to which it is entitled. To paraphrase *Gomillion v. Lightfoot*, 364 U. S. 339 (1960) the inescapable effect of this long established scheme is to despoil Negro citizens, and only them, of their right to participate meaningfully in the selection of school board members.

Where Negroes have been deprived of their political rights the remedy has been invalidation of the discriminatory features of the system, e.g., *Lane v. Wilson*, *supra*; *Smith v. Allwright*, *supra*. Where a vague delegation of

power has been the mechanism involved, the delegation has been abolished, *Louisiana v. U. S.*, *supra*. In their complaint, appellants also sought appointment of a receiver to operate the school system until a constitutional system of selecting board members could be instituted. In addition, the district court might have appropriately restricted control of the schools to Negro parents until whites demonstrated the kind of good faith which would render their participation no longer a danger to Negroes, say by reversing the withdrawal of their children from the system. The district court erred fundamentally, and, misconceived its function, in not adopting one of the available remedies which would eliminate the diminution of the franchise worked by the grand jury selection system.

Federal equity courts have broad power to mold their remedies and adapt relief to the circumstances and needs of particular cases. The test of the propriety of such measures is whether remedial action reasonably tends to dissipate the effects of the condemned actions and to prevent their continuance, *United States v. National Lead Co.*, 332 U. S. 319 (1947). Where a corporation, for example, has acquired unlawful monopoly power which would continue to operate as long as the corporation retained its present form, effectuation of the Sherman Antitrust Act has been held even to require the complete dissolution of corporate relationships. *United States v. Standard Oil Co.*, 221 U. S. 1 (1910); *Schine Chain Theatres v. United States*, 334 U. S. 110 (1948). Compare *N. L. R. B. v. Newport News Shipbuilding & Drydock Co.*, 308 U. S. 241, 250 (1939); *Louisiana v. United States*, 380 U. S. at 154 (1965). Numerous decisions establish that the federal courts construe their power and duties in supervising the dis-

establishment of racial discrimination to require as effective relief as in the antitrust area.³⁰ So in *Griffin v. School Board of Prince Edward County, Va.*, 377 U. S. 218 (1964) this Court ordered a public school system which had been closed to avoid desegregation to be reopened. See also *Green v. New Kent County Board of Education*, 391 U. S. 430, 438, n. 4 (1968).

In this case the deprivation of political power through the layers of discretion authorized by the statutory selection scheme—from appointment of jury commissioners by a judge elected by voters of six counties to grand jury selection—powerfully affects “matters that intimately touch the daily lives of citizens,” *Terry v. Adams*, 345 U. S. 461 (1953).³¹ The proper education of their children has

³⁰ E.g., *Carr v. Montgomery County (Ala.) Board of Education*, 253 F. Supp. 306 (M. D. Ala. 1966); *Dowell v. School Board of Oklahoma City*, 244 F. Supp. 971 (W. D. Okla., 1965) aff'd 375 F. 2d 158 (10th Cir., 1967), cert. den. 387 U. S. 931 (1967); *United States v. Logue*, 344 F. 2d 290 (5th Cir. 1965); *Board of Public Instruction of Duval Co., Fla. v. Braxton*, 326 F. 2d 616, 630 (5th Cir., 1964); *Wheeler v. Durham City Board of Education*, 346 F. 2d 768 (4th Cir., 1965); *Kelly v. Altheimer*, 378 F. 2d 483 (8th Cir., 1967); *United States v. Scarborough*, 348 F. 2d 168 (5th Cir. 1965).

³¹ Powerlessness to affect the fate of their children was one of the most characteristic—and one of the most destructive—aspects of Negro slavery. Yet, today in Taliaferro County, not only are Negro children trapped in a school system which keeps them in racial isolation, but the parents of those children are prohibited from influencing the administration of the schools. Negro parents are kept from attending board meetings, they cannot observe their children in class and they cannot even freely form a parents-teachers association, see pp. 12-14, *supra* (A. 188-190, 206-07, 210-211, 225, 229). Negro children do not enjoy an integrated education in Taliaferro largely because three years ago a scheme was devised enabling white students to avoid attending integrated schools. School board participation in this conspiracy was so well established that in 1965 the district court felt constrained to remove the school system from board control and place it in re-

been recognized time and again as of crucial importance to the Negro race since *Brown v. Board of Education*, 347 U. S. 483 (1954). That interest cannot be adequately protected within the context of a structure which is subject to total domination by county whites who have continually and consistently shown themselves antagonistic to the interests and rights of Negroes. Only three years ago white resistance to integration of the schools was so great as to necessitate a federal court to order placement of the school system in receivership. Since the termination of that receivership no change in white community sentiment has been manifested. There is no evidence in the record of any significant attempt by that community, or its school board, to reverse the exodus of white students from the public schools. The school board even refuses to listen to the grievances of Negro parents whose children do attend

ceivership. That receivership was terminated three months later with the expectation that the board would "resume the operation of a complete school system for 1966-67." The return of the schools to board control was "so that necessary plans for operating the school system in 1966-67 may be made." It was further noted that "the dual school system has been abolished for 1966-67." *Turner v. Goolsby*, 255 F. Supp. 724, 734 (S. D. Ga. 1965; supp. opinion 1966). The court clearly expected that the board was prepared to administer an integrated system but the board has not fulfilled that expectation. No board member has a child in the public schools (A. 23, 47). Nor has the board made any effective effort to induce a single white teacher or child back into the system (A. 357-59). In short, with regard to the education of their children, Taliaferro Negroes are in a position quite analogous to a pre-Civil War characterization of slaves as persons who were considered to be:

A subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority and had no rights or privileges but such as those who held the power, and the government might choose to grant them. *Dred Scott v. Sanford*, 19 How. 399, 404-05, 60 U. S. 393, 404-405 (1857).

the schools (*supra*, pp. 12-14). In such circumstances, the Georgia scheme for selecting school board members operates in this county to deprive appellants of rights guaranteed by the Constitution. Until the state provides a system of selecting board members which does not unconstitutionally dilute the votes of Negroes, the district court is obliged to fashion a remedy to ensure that those who control the school system fairly represent the interests of Negroes.

III.

Georgia's Prohibition of Membership on County Boards of Education to Non-Freeholders Violates the Fourteenth Amendment.

By statute and constitutional provision, Georgia restricts membership on those county boards of education which are selected by a county grand jury to "five freeholders"—persons who hold title real property in the county,³² Ga. Code Ann. §2-6801, Art. VIII, §V, para. I. of the Constitution of 1945;³³ Ga. Code Ann. §§32-902, 902.1.

The court below rejected appellants' contention that by prohibiting those who did not own real property from school board membership Georgia had violated the Equal

³² A freehold is a generic term which describes "any estate . . . existing in, or arising from" real property, 28 Am. Jur. 2d, Estates §8. As defined in Black's Law Dictionary a freeholder is "one having title to realty" (4th Ed. 1957) p. 793.

³³ The Georgia Constitution states:

The Grand Jury of each county shall select from the citizens of their respective counties five freeholders, who shall constitute the County Board of Education. Ga. Code Ann., §2-6801.

Protection Clause of the Fourteenth Amendment. The court did not decide what valid state interest, if any, this prohibition served. It merely concluded that this unequal treatment to non-freeholders did not amount to invidious discrimination:

There was no evidence to indicate that such a qualification resulted in any invidious discrimination against any particular segment of the community, based on race or otherwise (A. 403).

This language should not be understood as a finding by the district court that appellants lack standing, for the court granted, and appellees did not oppose, the intervention of a non-freeholder, a father of six school children, who plainly possessed requisite standing to challenge a statute which prohibited him from serving on the county school board, *Bond v. Floyd*, 385 U. S. 116 (1966); *Baker v. Carr*, 369 U. S. 186 (1962). The district court permitted intervention (A. 72, 73) for the express purpose of conferring standing and as Judge Bell put it: "... to make certain that the Court will reach the merits of the claim that an application based on freeholders is unconstitutional" (A. 370-71).

Numerous decisions of this Court, however, stand for the substantive proposition apparently rejected by the district court that the poor form a class protected by the Equal Protection Clause against state legislation which discriminates on the basis of wealth,³⁴ and *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966) makes plain that the Equal Protection Clause prohibits discriminatory treatment of the poor in the political arena.

³⁴ E.g., *Griffin v. Illinois*, 351 U. S. 12 (1956); *Smith v. Bennett*, 365 U. S. 708 (1961).

It is also established that the right to seek office as well as the right to vote may not be infringed on the basis of invidious discrimination. *Bond v. Floyd*, 385 U. S. 116 (1966); *Anderson v. Martin*, 375 U. S. 399, 401-402 (1964). The "right to choose, secured by the Constitution," *United States v. Classic*, 313 U. S. 299, 315 (1943) surely encompasses not only the casting of ballots but the right to appear on those ballots as a candidate, subject only to such rational requirements for candidacy consistent with the Equal Protection Clause as the States may prescribe. Participation in the electoral process necessarily includes the right to seek office. In *Bond v. Floyd*, *supra* at 385 U. S. 130, Georgia conceded that "if a State Legislature excluded a legislator on racial or other clearly unconstitutional grounds, the federal (or state) judiciary would be justified in testing the exclusion by federal constitutional standards."

On its face, the Georgia freehold qualification for school board membership operates as an unconstitutional denial of equal protection against the poor and non-landholders:

For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned. (*Harper, supra*, 383 U. S. at 670.)

In fact, the requirement that one be a freeholder is so much more substantial than the \$1.50 poll tax which the Court struck down in *Harper* that it emphasizes the disfranchisement in this case.³⁵ That Georgia's constitutional and

³⁵ Decisions in two recent cases construe *Harper* to compel the demise of financial restraints on enjoyment of political rights. Significantly, both cases dealt with the barrier involved in the in-

statutory limitation on the right to serve as a school board member to "five freeholders" is in violation of constitutional requirements is also supported by the principle that the standards of the Equal Protection Clause are the more exactly applied where the franchise is concerned. When the State attempts to restrict a fundamental right it can do so only on the showing of a "compelling interest." *Sherbert v. Verner*, 374 U. S. 398, 405 (1963); *N. A. A. C. P. v. Button*, 371 U. S. 415, 438 (1963); *West Virginia State Bd. of Educ. v. Barnette*, 319 U. S.

stant case—the antiquated condition of a right on the ownership of real property. In *Pierce v. Ossining*, 292 F. Supp. 113 (S. D. N. Y. 1968) the property requirement struck down was a prerequisite to voting in a town election. In *Landes v. Town of Hempstead*, 231 N. E. 2d 120, 20 N. Y. 2d 417, 284 N. Y. S. 2d 417 (1967), the New York Court of Appeals overruled a 1937 decision and rejected a property requirement as a limitation on the right to hold office. The New York Court of Appeals found that "it is impossible . . . to find any rational connection between qualifications for administering town affairs and ownership of real property" (20 N. Y. 2d at 421).

Two other cases reach a different result. *Cipriano v. City of Houma*, upheld a restriction that property taxpayers only vote on a resolution authorizing issuance of utility revenue bonds, 286 F. Supp. 823 (E. D. La. 1968) probable jurisdiction noted 37 U. S. L. Week 3275 (Jan. 14, 1969) O. T. 1968, No. 705. *Kramer v. Union Free School District No. 15*, O. T. 1968, No. 258, argued January 6, 1969, upheld a requirement that voters in a school election be either real property owners, their spouses, school district lessees (but not their spouses) or parents or guardians of children attending district schools, 282 F. Supp. 70 (E. D. N. Y. 1968); see also 259 F. Supp. 164 (E. D. N. Y. 1966). While appellants believe the views of the dissenting judges in these two cases are persuasive, these decisions in no way affect the question before the Court here. In *Kramer*, instead of the broad restriction to freeholders authorized by Georgia, New York law permitted parents, guardians, and lessees to vote, as well as those who own taxable real property and their spouses. In *Houma*, the vote did not concern public schools but only the relatively narrow question of whether to issue utility revenue bonds, a decision which also was subject to approval of the generally elected municipal government body.

624, 644 (1943); *Harper, supra* at 393 U. S. 669. In order to satisfy the requirement of "compelling interest" the state must demonstrate *all* of the following: (1) That the restriction imposed rationally relates to legitimate governmental objectives sought; (2) that the benefit to the public of those objectives outweighs the impairment of the constitutional right and that (3) no alternative means less subversive of the constitutional right are available. See *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Griswold v. Connecticut*, 384 U. S. 479 (1965); *N. A. A. C. P. v. Alabama*, 377 U. S. 238 (1964); *Aptheker v. Secretary of State*, 378 U. S. 500 (1964); *Sherbert v. Verner, supra*; *Edwards v. South Carolina*, 372 U. S. 229, 238 (1963); *N. A. A. C. P. v. Button, supra*, at 433; *Shelton v. Tucker*, 364 U. S. 479, 488 (1960); *Thomas v. Collins*, 323 U. S. 516, 530 (1945); *Schneider v. State*, 308 U. S. 147, 161 (1939); *Symposium on the Griswold Case and the Right of Privacy*, 64 Mich. L. Rev. 197 (1965).

The freeholder limitation is in no way supported by such a justification. The purpose of the provision is not expressed, but in the nineteenth century, when it was enacted, it was thought by many that only owners of real property were sufficiently concerned about government to exercise the duties of office. Whatever the validity of this conclusion in the past, it is plain that today one's interest in, or capacity for, public affairs does not depend on whether he is a landlord or a tenant. As Judge Weinstein has put it:

Some premises are no longer constitutionally permissible and legal syllogisms which embody them must be rejected. One constitutionally unacceptable hypothesis is that people owning rights to real property are more likely than citizens generally to exercise

their vote responsibly. Thus, a local policy based on the assumption that owners of property rights are particularly interested in school elections cannot justify denying the right to vote to other morally and intellectually qualified adults who meet residence requirements. *Kramer v. Union Free School Dist. No. 15*, 282 F. Supp. 70, 80 (E. D. N. Y. 1968) (dissenting opinion).

In short, the idea that only persons who hold real property are capable of holding public office reflects an obsolete and repudiated view of what constitutes equal protection.²⁶ *Harper v. Virginia State Board of Elections*, *supra*; *Lander v. Town of North Hempstead*, *supra*; cf. *McLaughlin v. Florida*, 379 U. S. 184, 190 (1964).

Nor can the freeholder requirement be rationally justified by a desire to limit service on boards which set tax rates to those who pay taxes, see *State ex rel. Mitchell v. Heath*, 345 Mo. 226, 132 S. W. 2d 1001, 1004 (1939)—even if one makes the dubious assumption that the public interest in education could be totally displaced by the taxpayer's interest in the use of funds that once were his.²⁷ In Georgia, the county school board has no direct taxing power but may only recommend a tax rate to county authorities (Ga. Code Ann. §§32-1118, 1127) and the property which is potentially subject to taxation for school purposes is not

²⁶ Ownership of land has even less rational relationship to qualifications for the office of school board member than other offices (town supervisor, county commissioner, etc.) because the school board is concerned with a delimited set of concerns, none of which has any relation to property holding.

²⁷ It should be noted that neither of the two state policies which Mr. Justice Black, dissenting, found would support the poll tax in *Harper*, 383 U. S. at 674 are available to justify the freeholder requirement.

limited to that of individual freeholders, Ga. Code Ann. §32-1116. Moreover, the Taliaferro school system raises but a small proportion of funds raised by ad valorem taxes (\$39,000 out of a total budget of \$267,611) (A. 49). The overwhelming majority of the budget is received from the state and federal governments.

Nor need Georgia limit board membership to five freeholders to achieve even the questionable benefits one might suppose for the freeholder requirement—as witnessed by the fact that a non-freeholder may apparently be appointed to a school board in those counties which have abandoned the grand jury selection device, see *infra* pp. 1a-2a. At any rate, other options are available to the state which do not involve needless denial of participation in organs of government which critically affect the public welfare. If it is the voice of the freeholder which the state wishes to have considered, school boards could be required to seek the written opinion of one or more freeholders concerning anticipated land purchases or transfers prior to making any decision thereon. Or school boards might be directed by statute to obtain legal counsel concerning any land transactions. But any claimed benefits of the present freeholder requirement are clearly outweighed by the extent to which parents of school children and other non-landed citizens generally are totally denied access to what may be the most important unit of local government and most available outlet for community political expression. (Cf. *Kramer v. Union Free School Dist. No. 15*, *supra*, 282 F. Supp. at 76-78 (dissenting opinion).)

Nothing appellants urge detracts in the least from the power of the states to assure that competent persons administer the public schools. In *Abington School District*

v. *Schempp*, 374 U. S. 203 (1963) for example, this Court recognized the special stake parents have in the proper administration of their schools by granting them standing to contest unconstitutional practices taking place in them. Georgia law does not, however, recognize a group with a special concern for the schools by limiting board membership to freeholders; on the contrary, it vests membership in a group with no such special concern. Where an interest as vital as the operation and management of the schools is involved, a state violates the Equal Protection Clause by restricting control of its educational establishment to those who own a particular class of property.

CONCLUSION

WHEREFORE, appellants pray that the judgment of the court below be reversed in so far as it denies declaratory and injunctive relief.

Respectfully submitted,

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APPENDIX

Constitutional and Statutory Provisions Involved

1. Article VIII, Section V, paragraph I, of the Constitution of the State of Georgia of 1945, Ga. Code Ann. §2—6801:

Establishment and maintenance; board of education; election, term, etc.—Authority is granted to counties to establish and maintain public schools within their limits. Each county, exclusive of any independent school system now in existence in a county, shall compose one school district and shall be confined to the control and management of a County Board of Education. The Grand Jury of each county shall select from the citizens of their respective counties five freeholders, who shall constitute the County Board of Education. Said members shall be elected for the term of five years except that the first election of Board members under this Constitution shall be for such terms that will provide for the expiration of the term of one member of the County Board of Education each year. In case of a vacancy on said Board by death, resignation of a member, or from any other cause other than the expiration of such member's term of office, the Board shall by secret ballot elect his successor, who shall hold office until the next Grand Jury convenes at which time the said Grand Jury shall appoint the successor member of the Board for the unexpired term. The members of the County Board of Education of such county shall be selected from that portion of the county not embraced within the territory of an independent school district.

The General Assembly shall have authority to make provision for local trustees of each school in a county system

and confer authority upon them to make recommendations as to budgets and employment of teachers and other authorized employees.

2. Article VIII, Section V, paragraph II, of the Constitution of the State of Georgia of 1945, Ga. Code Ann. §2—6802:

Boards of education; change by referendum.—Notwithstanding provisions contained in Article VIII, Section V, paragraph I [§2-6801] of this Constitution, or in any local constitutional amendment applicable to any county school district, the number of members of a county board of education, their term of office, residence requirements, compensation, manner of election or appointment, and the method for filling vacancies occurring on said boards, may hereafter be changed by local or special law conditioned upon approval by a majority of the qualified voters of the county school district voting in a referendum thereon. Members of county boards of education shall have such powers and duties and such further qualifications as may be provided by law.

3. Ga. Code Ann. §23—802:

Meetings of certain governing bodies to be public.—All meetings of the governing bodies of all municipalities and counties in this State, boards of public instruction, and all other boards, bureaus, Authorities or commissions in the State of Georgia, excepting grand juries, supported wholly or in part by public funds or expending public funds, shall be public meetings: Provided, however, that before or after said public meetings said governing bodies, boards, bureaus, Authorities or commissions may hold executive sessions

privately but the ayes and nays of any balloting shall be recorded at the conclusion of said executive sessions. (Acts 1965, p. 118.)

4. Ga. Code Ann. §32—901:

School districts.—Each and every county shall compose one school district, and shall be confided to the control and management of a county board of education. (Acts 1919, p. 320.)

5. Ga. Code Ann. §32—902:

Membership in County boards.—The grand jury of each county (except those counties which are under a local system) shall, from time to time, select from the citizens of their respective counties five freeholders, who shall constitute the county board of education. Said members shall be elected for the term of four years, and shall hold their offices until their successors are elected and qualified: *Provided*, however, that no publisher of schoolbooks, nor any agent for such publisher, nor any person who shall be pecuniarily interested in the sale of schoolbooks, shall be eligible for election as members of any board of education or as county superintendent of schools: *Provided*, further, that whenever there is in a portion of any county a local school system having a board of education of its own, and receiving its pro rata of the public school fund directly from the State Superintendent of Schools, and having no dealings whatever with the county board of education, then the members of the county board of education of such county shall be selected from that portion of the county not embraced within the territory covered by such local system. (Acts 1919, p. 320.)

6. Ga. Code Ann. §32—902.1:

Selection of board members by grand jury.—The members of the county boards of education in those counties in which the grand jury selects such members pursuant to Article VIII, Section V, Paragraph I of the Constitution of Georgia of 1945, as amended (Sec. 2-6801), shall be selected by the last grand jury immediately preceding the expiration of the term of the member that the member to be selected will replace. (Acts 1953, Nov. Sess., p. 334.)

7. Ga. Code Ann. §32—903:

Qualifications of members.—The grand jury in selecting the members of the county board of education shall not select one of their own number then in session, nor shall they select any two of those selected from the same militia district or locality, nor shall they select any person who resides within the limits of a local school system operated independent of the county board of education, but shall apportion members of the board as far as practicable over the county; they shall elect men of good moral character, who shall have at least a fair knowledge of the elementary branches of an English education and be favorable to the common school system. Whenever a member of the board of education moves his residence into a militia district where another member of the board resides, or into a district or municipality that has an independent local school system, the member changing his residence shall immediately cease to be on the board and the vacancy shall be filled as required by law. Notwithstanding the foregoing provisions to the contrary, a county may provide by local law that two or more members of the board of education may be selected from the same militia district. (Acts 1919, pp. 288, 321; 1965, p. 124.)

8. Ga. Code Ann. §32—905:

Certificate of election; removal; vacancies.—Whenever members of a county board are elected or appointed, it shall be the duty of the clerk of the superior court to forward to the State Superintendent of Schools a certified statement of the facts, under the seal of the court, as evidence upon which to issue commissions. This statement must give the names of the members of the board chosen and state whom they succeed, whether the offices were vacated by resignation, death or otherwise. The evidence of the election of a county superintendent of schools shall be the certified statement of the secretary of the meeting of the board at which the election was held. Any member of a county board of education shall be removable by the judge of the superior court of the county, on the address of two-thirds of the grand jury, for inefficiency, incapacity, general neglect of duty, or malfeasance or corruption in office, after opportunity to answer charges; the judges of the superior courts shall have the power to fill vacancies, by appointment, in the county board of education for the counties composing their respective judicial circuits, until the next session of the grand juries in and for said counties, when said vacancies shall be filled by said grand juries. (Acts 1919, p. 322.)

9. Ga. Code Ann. §32—908:

Sessions.—It shall be the duty of the county board of education to hold a regular session between the 1st and 15th of each month at the county seat for the transaction of business pertaining to the public schools, with power to adjourn from time to time, and in absence of the president or secretary, they may appoint one of their own number

to serve temporarily. The county board of education shall annually determine the date of the meeting of said board and shall publish same in the official county organ for two consecutive weeks following the setting of said date: Provided further that said date shall not be changed oftener than once in 12 months. (Acts 1919, p. 323; 1955, pp. 625, 626.)

10. Ga. Code Ann. §32—909:

School property and facilities.—The county boards of education shall have the power to purchase, lease, or rent school sites; build, repair or rent school houses, purchase maps, globes, and school furniture, and make all arrangements necessary to the efficient operation of the schools. The said boards are invested with the title, care and custody of all schoolhouses or other property, with power to control the same in such manner as they think will best serve the interests of the common schools; and when, in the opinion of the board, any schoolhouse site has become unnecessary or inconvenient, they may sell the same in the name of the county board of education, and said county boards of education may convey any schoolhouse site or building, which has become unnecessary or inconvenient for county school purposes and which is located in a municipality, to the municipality wherein said site or building is located to be used by said municipality for educational or recreational purposes in consideration for the municipality's promise and agreement to maintain and keep said property in repair and insured against loss by fire and windstorm; such conveyance to be executed by the president or secretary of the board, according to the order of the board. They shall have the power to receive any gift, grant, donation or devise made for the use of the common

schools within the respective counties, and all conveyances of real estate which may be made to said board shall vest the property in said board of education and their successors in office. In respect to the building of schoolhouses, the said board of education may provide for the same by a tax on all property located in the county and outside the territorial limits of any independent school system. The construction of all public school buildings must be approved by the superintendent and board of education and must be according to the plans furnished by the county school authorities and the State Board of Education. (Acts 1919, p. 323; 1937, pp. 882, 892; 1946, pp. 206, 207; 1961, pp. 35, 38; 1962, pp. 654, 655.)

11. Ga. Code Ann. §32—1101:

Each county to compose one school district; management by county board of education.—Pursuant to the amendment to the Constitution adopted in 1945, each county of this State, exclusive of any independent school system now in existence in a county, shall compose one school district and shall be confined to the control and management of a county board of education. (Acts 1919, p. 333; 1946, pp. 206, 209.)

12. Ga. Code Ann. §32—1118:

Other provisions made applicable. County Board to recommend school tax rate to fiscal authorities.—All of the other provisions of Chapter 92-27, so far as they can be applied are applicable to the assessment and collection of taxes of all such companies and corporations which are required by law to make their returns to the State Revenue Commissioner by and for school districts upon the property and franchises of such companies located in such school districts and upon the rolling stock, franchises and other

personal property distributed under the provisions of this Chapter. The county board of education shall annually recommend to the fiscal authorities of the county the rate of levy to be made for taxes for the support and maintenance of education in the county (exclusive of property located in independent school districts), and likewise notify the State Revenue Commissioner of the rate of the levy to be made on such property in said county for the support and maintenance of education. (Acts 1919, p. 343; 1946, pp. 206, 212.)

13. Ga. Code Ann. §32—1127:

Power to levy and collect taxes.—Power is hereby delegated to, and conferred upon, the several counties to levy and collect taxes for educational purposes in such amounts as the county authorities shall determine, the same to be appropriated to the use of the county board of education, and the educational work directed by them. (Acts 1922, pp. 81, 82.)

14. Ga. Code Ann. §59—101:

Jury commissioners; appointment; number; qualifications; terms; removal.—There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor: Pro-

vided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners. (Acts 1878-9, p. 27; 1887, p. 52; 1901, p. 43; 1935, p. 151.)

15. Ga. Code Ann. §59—106:

Revision of jury lists. Selection of grand and traverse jurors.—At least biennially, or, if the judge of the superior court shall direct, at least annually, on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall compile and maintain and revise a jury list of intelligent and upright citizens of the county to serve as jurors. In composing such list the commissioners shall select a fairly representative cross-section of the intelligent and upright citizens of the county from the official registered voters' list which was used in the last preceding general election. If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross-section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly representative thereon.

After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, except

as otherwise provided herein, and no new names shall be added until those names originally selected have been completely exhausted, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead.

16. Ga. Code Ann. §59—202:

Number of grand jurors.—A grand jury shall consist of not less than 16 nor more than 23 persons. (Cobb, 547. Acts 1869, p. 140; 1967, pp. 590, 591.)

17. Ga. Code Ann. §59—203:

Manner of drawing.—The judges of the superior courts, at the close of each term, in open court, shall unlock the box, and break the seal, and cause to be drawn from compartment number "one" not less than 18 nor more than 36 names to serve as grand jurors at the next term of the court; all of which names shall be deposited in compartment number "two"; and when all the names shall have been drawn out of the compartment number "one," then the drawing shall commence from compartment number "two," and the tickets be returned to number "one," and so on alternately; and no name so deposited in the box shall, on any pretense whatever, be thrown out of it, or destroyed, except when it shall be satisfactorily shown to the judge that the juror is dead, removed out of the county, or otherwise disqualified by law. (Acts 1869, p. 140; 1874, p. 20; 1966, p. 470.)

18. Ga. Code Ann. §59—318:

Selection of persons for offices by grand jury; notice.—Whenever it is provided by law that the grand jury of any

county shall elect, select or appoint any person to any office, notice thereof shall be given in the manner hereinafter provided. (Acts 1958, p. 686; 1959, p. 424.)

19. Ga. Code Ann. §59—319:

Same; publication.—It shall be the duty of the clerk of the superior court to publish in the official organ of the county a notice that certain officers are to be elected, selected or appointed by the grand jury of said county. Such publication shall be made once a week for two weeks during a period not sooner than 60 days prior to such election, selection or appointment. The cost of such advertisement shall be paid from the funds of the county, and it shall be the duty of the governing authority of the county to promptly pay said cost. (Acts 1958, pp. 686, 687; 1959, pp. 424, 425.)

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**IN THE
SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1968.

No. ~~202~~ 23

**CALVIN TURNER, et al.,
Appellants,**

v.

**W. W. FOUCHE, et al.,
Appellees.**

**BRIEF FOR THOSE WHO ARE REMAINING
APPELLEES (OTHER THAN STATE
OF GEORGIA).**

**CHARLES J. BLOCH,
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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 842.

CALVIN TURNER, et al.,
Appellants,

v.

W. W. FOUCHE, et al.,
Appellees.

**BRIEF FOR THOSE WHO ARE REMAINING
APPELLEES (OTHER THAN STATE
OF GEORGIA).**

INTRODUCTORY STATEMENT.

This case continues to bear the title **Calvin Turner, et al., Appellants v. W. W. Fouche, et al., Appellees**, although the Appendix very clearly shows that on January 30, 1968, "on motion of the defendants, the defendants W. W. Fouche, Rastum Durham and Elmo Bacon, individually and in their capacities as Grand Jurors of Taliaferro County, Georgia, are hereby struck as defendants" (Appendix, p. 71).

In our motion to dismiss or affirm filed herein on or about January 30, 1969, we made a special motion with respect to Fouche, Durham and Bacon (page 16 thereof). When on February 24, 1969, the Court noted probable jurisdiction, there was apparently no ruling as to this special motion. We renew it.

Because of 28 U. S. C., § 1253, this case is here on direct appeal from a judgment of a Three-Judge District Court convened pursuant to 28 U. S. C., § 2281.

In the Court below we contended that the case as alleged in the complaint was not one for a Three-Judge Court. We moved to dissolve it (Appendix, page 19). This motion was denied.

When the direct appeal and subsequent jurisdictional statement were filed, we moved to dismiss or affirm.

We then contended that the case was not one for a Three-Judge Court. We filed a brief in support of that contention. Nevertheless, probable jurisdiction was noted (February 25, 1969. Appendix, page 408).

We continue to contend that the complaint did not allege a case within the purview of Title 28—§ 2281, and hence not one of which this Court has jurisdiction by direct appeal. Even now, the Court may so hold and dismiss the appeal.

Supreme Court Practice (Robert L. Stern; Eugene Gressman) Third Edition, pages 51-2; **United States v. Griffin**, 303 U. S. 226.

But, if the Court decides that it has jurisdiction, what are the questions of which it has jurisdiction?

The only statute which could have conferred jurisdiction on the Court below is Title 28, U. S. C., § 2281.

Under that statute, and the cases construing it, the need for a Three-Judge Court and the scope of its jurisdiction,

and the consequent jurisdiction of this Court on direct appeal are very limited ones.

“ . . . the section does not apply where, as here, although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved.” **Ex Parte Collins**, 277 U. S. 565, 568 (48 S. Ct. 585, 586).

Later, Mr. Justice Frankfurter, writing for a unanimous court in **Phillips, Governor v. United States, et al.**, 312 U. S. 246, at page 249, cited **Ex Parte Collins** as authority for the statement “The legislation was designed to secure the public interest in ‘a limited class of cases of special importance’.”

Immediately following that citation, he wrote:

“It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity. While Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge, it was no less mindful that the requirement of three judges, of whom one must be a Justice of this Court or a circuit judge, entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but the few great metropolitan areas are such regions. Moreover, inasmuch as this procedure also brings direct review of a district court to this Court, any loose construction of the requirements of § 266 would defeat the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate docket. **Moore v. Fidelity & Deposit Co.**, 272 U. S. 317, 321. The history of § 266 (see **Pogue, State Determination of State**

Law, 41 Harv. L. Rev. 623, and **Hutcheson, a Case for Three Judges**, 47 Harv. L. Rev. 795), the narrowness of its original scope, the piece-meal explicit amendments which were made to it (see Act of March 4, 1913, 37 Stat. 1013, and Act of February 13, 1925, 43 Stat. 936, amending § 238 of the Judicial Code), the close construction given the section in obedience to Congressional policy (see, for instance, **Moore v. Fidelity & Deposit Co.**, *supra*; **Smith v. Wilson**, 273 U. S. 388; **Ex parte Collins**, *supra*; **Oklahoma Gas Co. v. Packing Co.**, 292 U. S. 386; **Ex parte Williams**, 277 U. S. 267; **Ex parte Public National Bank**, 278 U. S. 101; **Rorick v. Board of Comm'rs.**, 307 U. S. 208; **Ex parte Bransford**, 310 U. S. 354), combine to reveal § 266 not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such.

“To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an ‘administrative board or commission.’ The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state’s legislative policy. This was the aim of Congress and this is the reconciling principle of the cases.”

Ex parte Collins, *supra*, has recently been cited, applied and followed in **Moody v. Flowers**, 387 U. S. 97, 101-2.

See also, “Motion of Appellees (other than State of Georgia) to dismiss or affirm” (filed herein), pages 5-8.

Counsel for appellants have from time to time as this litigation progressed varyingly stated the questions involved.

In the complaint, it is alleged that each of certain statutes "is unconstitutional under the Equal Protection and Due Process of Law Clauses of the Fourteenth Amendment of the Constitution of the United States, and the Thirteenth Amendment thereto **on its face and as applied**, by reason of the systematic and long continued exclusion of Negroes, the uncertainty, vagueness, and ambiguity of the standards set forth therein, and by reason of the total exclusion of non-freeholders as members of the Board of Education of Taliaferro County" (Emphasis added, Appendix, p. 12) (See also Appendix, pages 9, 12-13, 14).

In the jurisdictional statement filed by counsel for the appellants, the "Questions Presented" are stated at page 3 (The last one was afterwards corrected).

In Appellants' brief filed by the same counsel, the "Questions Presented" are stated at page 4.

The Three-Judge Court in its opinion said:

"The court finds and concludes that the grand jury list, as revised, is not unconstitutional or illegal. The court finds and concludes that the constitutional provision and the statutes in question are not unconstitutional on their face or as applied. There is nothing in the constitutional provision or in the statutes which contemplates or permits the resulting systematic exclusion from the grand juries. The standards are not inadequate. The facts showed systematic exclusion in the administration of the grand jury system prior to the revision but this resulted from the administration of the system and not from the constitutional provision and statutes under attack. The court also concludes that the provision requiring that members of the school board be freeholders has not been shown to be an unconstitutional requirement. There was no evidence to indicate that such a qualification resulted in an invidious discrimination against any

particular segment of the community, based on race or otherwise.

“There is thus no merit in the three-judge District Court questions presented. There remain, however, two single judge questions . . .” (Appendix, page 403).

As we construe Title 28—§ 2281 and the many cases construing it, the only possible questions which the Supreme Court would have jurisdiction to adjudicate on this direct appeal are:

1. Is Article VIII, Section V, Paragraph 1 of the Constitution of Georgia (Code § 2-6801) (Appendix 1a-2a) unconstitutional because therein Georgia restricts membership on County Boards of Education to “freeholders”?

2. Is § 59-101 of the Georgia Code of 1933 (Annotated) (and related dependent statutes) (Appendix 8a) of the Georgia Code unconstitutional because it requires the Board of Jury Commissioners appointed by the Judge of the Superior Court of the Circuit to be “discreet persons”?

3. Is § 59-106 (and related dependent statutes) of the Georgia Code unconstitutional on its face because the jury commissioners are restricted in their making up of jury lists to the choosing of “intelligent and upright citizens”?

BRIEF AND ARGUMENT.

As a preliminary to a discussion of the law questions stated, we note the opening words of the argument of counsel for appellants in their brief (page 25). They say:

“In **Whitus v. Georgia**, 385 U. S. 545, 552 (1967), this Court condemned Georgia statutes which injected race into the selection of jurymen because they provided an ‘opportunity to discriminate’.”

What this Court actually wrote in **Whitus v. Georgia**, 385 U. S. 545, at page 552, was this:

“Under such a system the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the commissioners. Indeed, the disparity between the percentage of Negroes on the tax digest (27.1%) and that of the grand jury venire (9.1%) and the petit jury venire (7.8%) strongly points to this conclusion. Although the system of selection used here had been specifically condemned by the Court of Appeals, the State offered no testimony as to why it was continued on retrial. The State offered no explanation for the disparity between the percentage of Negroes on the tax digest and those on the venires, although the digest must have included the names of large numbers of ‘upright and intelligent’ Negroes as the statutory qualification required. In any event the State failed to offer any testimony indicating that the 27.1% of Negroes on the tax digest were not fully qualified. The State, therefore, failed to meet the burden of rebutting the petitioners’ prima facie case.”

We know of no standard of conduct which could prevent **attempted** discrimination with respect to the subject matter. When an attempt to discriminate invidiously occurs, those against whom the attempt is made have

their remedy and redress. But, that does not mean that the statute is unconstitutional.

What was condemned in the *Whitus* case was not the Georgia Statute, but "the use by the State of a system of jury selection which had been previously condemned, . . ." (385 U. S. 545-6).

Then, in the brief follows this language:

" . . . see also **Sims v. Georgia**, 389 U. S. 404 (1967); **Cobb v. Georgia**, 389 U. S. 12 (1967); **Jones v. Georgia**, 389 U. S. 24 (1967); **Anderson v. Georgia**, 390 U. S. 206 (1968); **Sullivan v. Georgia**, 390 U. S. 410 (1968); **Bostick v. South Carolina**, 386 U. S. 479 (1967)."

Instead of contenting ourselves with "seeing also", let us see what each of the cases cited holds.

Sims v. Georgia, 389 U. S. 404, holds:

"The manner in which the juries which indicated and convicted petitioner were selected was unconstitutional . . ." (**Sims v. Georgia**, 389 U. S. 404 (2)).

Cobb v. Georgia, 389 U. S. 12, is a three line per curiam opinion, reading:

"The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed. **Whitus v. Georgia**, 385 U. S. 545."

Jones v. Georgia, 389 U. S. 24, is a case in which one of counsel for the appellees here was counsel for Jones.

Then Jones appealed his murder conviction on the ground, among others, that the evidence of systematic exclusion of Negroes from grand and petit juries established a prima facie case of discrimination under **Whitus v. Georgia**, *supra*. The Court held that this prima facie case had not been overcome, and reversed.

Anderson, et al. v. Georgia, 390 U. S. 206, is a three line per curiam opinion exactly like that in **Cobb, supra**, except the last sentence is "The judgments of the Supreme Court of Georgia are reversed."

Sullivan v. Georgia, 390 U. S. 410, is a similar three line per curiam decision rendered March 18, 1968 (It has recently reappeared in the Supreme Court of Georgia and will be discussed hereinafter).

Bostick v. South Carolina, 386 U. S. 479, is a two line per curiam opinion reading: "The judgment of the Supreme Court of South Carolina is reversed. **Whitus v. Georgia**, 385 U. S. 545 (1967)."

No one of the cases would seem to help very greatly in the solution of the constitutional questions presented to the Three-Judge Court.

I.

Is Article VIII, Section V, Paragraph I of the Constitution of Georgia (Code § 2-6801—Appendix 1a-2a) unconstitutional because therein Georgia restricts membership on County Boards of Education to "freeholders"?

In **Vought, Impleaded with Collins v. State of Wisconsin**, 217 U. S. 590 (1910), the plaintiff in error had been convicted and sentenced. He asserted that the law under which the jury was drawn was unconstitutional under the Fourteenth Amendment in that he was put to trial under an indictment found by persons selected by jury commissioners who were required by statute to be **freeholders**. The case was argued April 15, 1910. Three days later, April 18, 1910, a Court composed of Chief Justice Fuller, and Associate Justices John Marshall Harlan, Edward D. White, Joseph McKenna, Oliver Wendell Holmes, William R. Day, and Horace H. Lurton dismissed the case for want of jurisdiction as the Federal question attempted to be raised was without merit.

This prompt disposition of that case could have been foreseen by the fact that in 1880 it had been explained by the Court, when composed of justices familiar with the evils the Fourteenth Amendment sought to remedy, as permitting a State to "confine the selection (of jurors) to males, to freeholders, to citizens, to persons within certain ages or to persons having educational qualifications." **Strauder v. State of West Virginia**, 100 U. S. 303, 310, quoted in **Brown v. Allen**, 344 U. S. 443, 471.

Thus a state may constitutionally require a jury commissioner to be a freeholder. *A fortiori*, a State may require a member of a County Board of Education to be a freeholder. The reasons are succinctly discussed by the Supreme Court of Georgia in **Thornton v. McElroy**, 193 Ga. 859.

There, an act of the General Assembly creating the Board of Commissioners of Roads and Revenues of Clayton County provided that the Commissioners should be freeholders and qualified voters of the County. McElroy was not a freeholder of Clayton County though he did own land in another county. He was held to be disqualified.

The Court said:

"This is also the reasonable construction to be given the sentence, because a person's ownership of land in one county would seem to have little or no relationship to his qualification to hold office as a county commissioner in another county while his ownership of land in the county in which he is elected commissioner might be expected to have a direct bearing on his conduct in the performance of the duties of that office. The board of commissioners has charge of the fiscal affairs of the county, and the amount of taxes levied may depend to a large extent upon the manner in which the affairs of the county are conducted by that board. A commissioner

who owns real estate in the county must bear its proportionate part of the cost of government, might reasonably be expected to be more prudent in the expenditure of county money than one who does not own property in the county" (**Thornton v. McElroy**, 193 Ga. 859, at pages 860-1).

Appellants say in their brief (page 52):

"The purpose of the provision is not expressed, but in the nineteenth century, when it was enacted, it was thought by many that only owners of real property were sufficiently concerned about government to exercise the duties of office."

This provision is in the Georgia Constitution of 1945, so it is by no means archaic. While those who prepared and adopted the Constitution may not have expressed the purpose of the Constitutional provision, and while the General Assembly in adopting subsequent statutes may not have expressed the purpose, it is clear that there was a purpose. These boards "are invested with the title, care and custody of all school houses and other property with power to control the same in such manner as they think will best serve the interests of the common schools; and when in the opinion of the board, any school house site has become unnecessary or inconvenient, they may sell the same in the name of the county board of education; . . . (Ga. Code Ann., § 32-909—See Appendix to Appellants' brief, page 6 (a)).

"In respect to the building of school houses, the said board of education may provide for the same by a tax on all property located in the county and outside the territorial limits of any independent school system" (*Ibid*).

We will not labor the question by detailing other duties of such Boards.

A person having such fiscal responsibilities should have the qualification of having acquired some property himself. At least, the people of Georgia and their General Assembly thought so, and certainly that thought, while perhaps old-fashioned in the views of some people, cannot be deemed arbitrary, capricious or invidious.

“State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . .” (**McGowan v. Maryland**, 366 U. S. 420, 425-6).

Among the cases cited by the Court, there are **Williamson v. Lee Optical**, 348 U. S. 483, 489 (in footnote 3, page 426), and **Lindsey v. Natural Carbonic Gas Co.**, 220 U. S. 61, which the Court has recently (37 L. W. 4339) cited to support the statement: “Under the traditional standard, equal protection is denied only if the classification is ‘without any reasonable basis’.”

II.

Is § 59-101 of Georgia Code Annotated and related statutes (appendix 8a) unconstitutional because it requires the Board of Commissioners appointed by the Judge of the Superior Court of the Circuit to be “discreet persons”?

The sentence of the statute here attacked is:

“There shall be a board of jury commissioners composed of six discreet persons, who are not practicing attorneys at law or county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the Superior Court.”

The attack is that it is left to the respective Judges of the Superior Courts of Georgia to determine whether

people he selects as jury commissioners are "discreet persons".

Under the Constitution of the State of Georgia (Code § 2-3801) "There shall be a Judge of the Superior Courts for each judicial circuit". The Superior Courts of Georgia are the highest in rank of the nisi-prius courts. No person may be a Judge of the Superior Court under Georgia's constitution unless at the time of his election, he shall have attained the age of thirty years, and shall have been a citizen of the State three years, and have practiced law for seven years (Code § 2-4801). By statute, they are prohibited from practicing law (§ 24-2607). Their jurisdiction is stated in § 24-2615 of the Code as well as in the Constitution (Code § 2-3901).

Georgia, as perhaps do other States, leaves many decisions to the discretion of the Judges of its highest trial court. For example, the "granting and continuing of injunctions shall always rest in the sound discretion of the judge, according to the circumstances of each case" (Georgia Code Annotated § 55-108). Considerable discretion is vested in such judicial officers in the administration of the criminal laws. It is to be assumed that they know the meaning of the word "discreet". If anything in the law may be presumed, certainly a person possessing those qualifications which a Superior Court Judge in Georgia must have will be presumed to know that "discreet" means "prudent; cautious; wary; careful about what one says or does". If he doesn't, he is presumed to have a dictionary handy.

"Discreetly" means with discernment, prudently, judiciously. **Parks v. Des Moines**, 191 N. W. 728.

In a recent case, **Southern Railway Company v. Shealey**, 382 Fed. (2d) 752, Georgia's blow-post law (Code § 94-506) was attacked as being unconstitutionally vague under the due process and equal protection standards applicable to criminal cases. The Court said:

“Finally the appellant urges that the requirement in the Statute to give ‘long’, ‘short’, ‘loud’, and ‘distinct’ blasts of the whistle is vague because there is no standard to show what length blast is ‘long’ or ‘short’, what intensity of a blast is ‘loud’, or what quality of a blast is ‘distinct’, and that it is therefore unconstitutional. We are concerned here with a rule of civil conduct, not with the due process and equal protection standards applicable to a criminal case. In this instance ‘the standard . . . is the practical criterion of fair notice to those to whom the statute is directed.’ **Southern Ry. Co. v. Brooks**, 1965, 112 Ga. App. 324, 145 S. E. (2d) 76, 79. We know that blow post laws are universally in effect throughout the country and it takes no semanticist to understand the usual, accepted and ordinary meaning of the statutory words.”

Neither does it take a semanticist to understand the usual, accepted and ordinary meaning of the word “discreet”.

Suppose the word “discreet” were not in the statute, would it be void because no standard was given to the Judge by which to determine whom he should appoint as jury commissioners? We think not. It would be presumed that the Judges of the Superior Courts, in the administration of justice, would appoint persons whose traits of character, intelligence, devotion to duty warranted their sharing in such administration. If a judge should willfully or erroneously appoint an unfit person, the citizens of the county would have their remedy.

III.

Is § 59-106 (and related statutes) of the Georgia Code unconstitutional on its face because the Jury Commissioners are restricted in their making up of jury lists to the choosing of intelligent and upright citizens?

At page 34 of their brief, counsel for the appellants write: “In other spheres of governmental activity this

Court has declared similar language permitting public officials to make subjective decisions unconstitutional." Then in footnote 22 appended to the quoted language is a list of cases commencing with **United States v. L. Cohen Grocery Co.**, 255 U. S. 81. That was a criminal case. The basis of the decision was that the Constitution requires "that persons accused of crime shall be adequately informed of the nature and cause of the accusation."

Cline, Dist. Atty. v. Frink Dairy Co., 274 U. S. 445 ruled that the Fourteenth Amendment requires that there be due process of law, and imposes on the states an obligation to frame criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required (Compare **Connally v. General Construction Co.**, 269 U. S. 385, 391).

Herndon v. Lowry, 301 U. S. 242 involved a habeas corpus proceeding following a conviction for an alleged crime.

Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, held that a New York statute authorizing the issuance of a license for the exhibition of films unless the film is "sacriligious" has an unconstitutional abridgement of free speech and free press as applied to the banning of a certain motion picture.

Winters v. People of the State of New York, 303 U. S. 507, involved a criminal prosecution. At page 515, the Court pointed out: "The standards of certainty in statutes punishing for offenses is higher than in those depending upon civil sanction for enforcement." And even the stronger are the standards in statutes punishing for offenses higher than in those prescribing standards for those selected to perform certain governmental functions. For example, Title 5 U. S. C., § 293 provides "There shall be in the Department of Justice an officer learned in the law, to assist the Attorney General in the performance

of his duties, called the Solicitor General, who shall be appointed by the President by and with the advice and consent of the Senate . . .”

The phrase “learned in the law” is very vague, and might provoke considerable difference of opinion in a given situation, but would hardly result in a decision holding the Statute unconstitutional.

As we read **Louisiana v. United States**, 380 U. S. 145 (Appellants’ brief, pages 34-35), while the statute there under consideration was found invalid, one of the compelling reasons for the holding was that “Louisiana . . . provides no effective method whereby arbitrary and capricious action by registrars of voters may be prevented or redressed.” **Louisiana v. United States**, 380 U. S. 145 at page 152, citing 225 F. Supp. at 384.

With respect to the Mississippi Anti-Picketing Law, the Supreme Court (Justices Douglas and Fortas dissenting) said:

“But the statute prohibits only ‘picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses . . .’ The terms ‘obstruct’ and ‘unreasonably interfere’ plainly require no ‘guess(ing) at (their) meaning.’ Appellants focus on the word ‘unreasonably.’ It is a widely used and well understood word and clearly so when juxtaposed with ‘obstruct’ and ‘interfere.’ We conclude that the statute clearly and precisely delineates its reach in words of common understanding . . .” **Cameron v. Johnson**, 390 U. S. 611 at 616.

The standard of “uprightness and intelligence” could certainly not be adjudged uncertain, indefinite, or vague as used in the statutes under consideration. The adjectives “upright” and “intelligent” are words of “common understanding.”

For a century at least that standard has appeared in the Georgia law. The Constitution of Georgia of 1868 declared "that the General Assembly shall provide by law for the selection of upright and intelligent persons to serve as jurors." (**Moses v. State**, 60 Ga. 140, 141.) The Act of 1869 (Ga. Laws 1869, p. 139) provided in what manner those upright and intelligent persons should be selected as jurors.

Section 59-106 as it appeared in the Code of 1933 used the phrase "upright and intelligent", as did the codes back to 1869, to-wit: 1910, P. C. § 819; 1895, P. C. § 818; 1882, § 3910 (d); 1873, § 3907.

Until May 8, 1969, there had been no Georgia case defining the phrase. We suppose that was so because the meaning of the words is so plain that in 100 years no one questioned their meaning.

On May 8, 1969, the Supreme Court of Georgia decided No. 25147—**Sullivan v. The State**. (See also 223 Ga. 643; reversed, 390 U. S. 410, mentioned *supra*.)

We quote from a typescript copy of the opinion in that case: "Enumeration of error 4 alleges that Code § 59-106, as amended (Ga. Laws, 1967, page 25; Ga. Laws, 1968, page 533) is unconstitutional in that it requires the jury commissioners to compile, maintain, and revise a jury list of intelligent and upright citizens to serve as jurors, and the 'most experienced, intelligent and upright citizens' to serve as grand jurors, thereby allowing the commissioners to apply purely subjective, vague, and ambiguous standards in jury selection, in violation of the due process and equal protection clauses of the United States Constitution and Art. I, Sec. I, Par. III, V and XXV of the Constitution of Georgia."

"The question is whether the terms 'intelligent and upright' and 'most experienced, intelligent and upright'

are vague and indefinite to the point that due process and equal protection of the law would be denied.”

“The Supreme Court of the United States in **Brown v. Allen**, 344 U. S. 443 (73 S. C. 397, 97 L. E. 469), stated that: ‘Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.’ The Supreme Court there recognized that the cross section of the population must be suitable in character and intelligence for the duty. In other words, character and intelligence are tests of qualification for jury service.”

“The Georgia statute, requiring that ‘intelligent and upright’ citizens be selected for jury service, is no more vague and indefinite than the criterion fixed by the Supreme Court. Honest, just, conscientious, scrupulous, and honorable, are synonyms for upright. Webster’s International Dictionary, Third Edition, page 2518. The Court in using the words ‘suitable in character’ must necessarily have had reference to good character, honest, honorable, or just persons. The Court in using the words ‘suitable . . . in intelligence for that civic duty’ meant that they were sufficiently intelligent to serve as a juror.”

“The terms are not vague and indefinite. It is common knowledge that an upright person is one who is honorable, honest, and will do the right as he sees it. An intelligent person is one possessed of ordinary information and reasoning faculty. No particular degree of intelligence is required by this statute. Idiots, morons, and insane persons are not intelligent and would not qualify.”

“The terms ‘upright’ and ‘intelligent’ are neither vague nor indefinite, and a court or board would have no

difficulty in their application. This ground is without merit."

The Georgia Court might have added that in **Brown v. Allen**, at pages 471-2 (of 344 U. S.), the Court also said:

"Responsible as this Court is under the Constitution to redress the jury packing which Bentham properly characterized as a sinister species of art, Bentham, *Elements of the Art of Packing as applied to Special Juries*, page 6, it should not condemn good faith efforts to secure competent juries merely because of varying racial proportions."

Georgia's plan of good faith efforts to secure competent juries consists of these steps:

1. A Superior Court Judge, chosen by the Voters of his Circuit, possessing qualifications prescribed by Georgia's Constitution appoints discreet persons as Jury Commissioners;

2. Those Jury Commissioners choose from the official registered voters' list a jury list of intelligent and upright citizens of the county to serve as jurors.

3. Those jury commissioners pursuant to Georgia Code Annotated, § 59-106 (as amended by the Acts of 1968), after selecting the citizens to serve as jurors, must select from that jury list a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors.

CONCLUSION.

The appellants' brief concludes with a prayer that the judgment of the Court below be reversed insofar as it denies declaratory and injunctive relief.

It will be noted (Appendix—page 406) that the Court below in its final judgment permanently enjoined the jury

commissioners from systematically excluding Negroes from the grand jury system in Taliaferro County. The Court did this despite the fact that it had found and concluded "that the grand jury list, as revised, is not unconstitutional or illegal."

So, the only questions remaining subject to review are those which spring from a portion of paragraph II of the Final Judgment (Appendix, pages 406-7).

That portion is:

"Article VIII, Section V, Paragraph One of the Constitution of the State of Georgia of 1945, 2 Georgia Code Annotated, Section 6801, 59 Ga. Code Annotated, Sections 101 and 106; and 32 Georgia Code Annotated, Sections 902.1, 903 and 905, are not unconstitutional on their face or as applied . . ."

Respectfully submitted,

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Certificate.

I certify that a copy of the within and foregoing brief has been transmitted by United States Mail with proper postage affixed to Messrs. Jack Greenberg and Michael Meltsner, 10 Columbus Circle, New York, New York, and a copy to Messrs. Howard Moore, Jr. and Peter Rindskoff,

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for Appellants, and a copy to Alfred L. Evans, Jr., Es-
quire, Assistant Attorney General of the State of Georgia,
132 State Judicial Building, Atlanta, Georgia 30334.

This 5th day of June, 1969.

.....
Of Counsel for Remaining Appellees
Other Than State of Georgia.

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IN THE
Supreme Court of the United States

October Term, 1968

No. 842

CALVIN TURNER, et al,

Appellants,

v.

W. W. FOUCHE, et al,

Appellees.

**On Appeal from the United States District Court
for the Southern District of Georgia,
Augusta Division**

BRIEF OF THE STATE OF GEORGIA (an Appellee)

JURISDICTION

Appellants invoke this Court's jurisdiction to directly review a decision of a United States District Court under 28 U.S.C. § 1253. For the reasons set forth in its previously filed brief in support of its Motion to Dismiss it is the position of the State of Georgia, an Appellee, that jurisdiction is not properly invoked under 28 U.S.C. § 1253 and that under this Court's decision in *Moody v. Flowers*, 387 U.S. 97 (1967) Appellants should have

taken their appeal to the United States Court of Appeals for the Fifth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

While the various constitutional and statutory provisions of the State of Georgia cited by Appellants are accurately set forth in the appendix to their brief, we think Article VIII, Section VI, Paragraphs I and II of the Constitution of the State of Georgia of 1945 (Ga. Code Ann. §§ 2-6901 and 2-6902) are also pertinent to adequate evaluation of their contentions. These State constitutional provisions provide:

Paragraph I — "There shall be a County School Superintendent, who shall be the executive officer of the County Board of Education. He shall be elected by the people and his term of office shall be for four years and run concurrently with other county officers. The qualifications and the salary of the County School Superintendent shall be fixed by law."

Paragraph II — "Notwithstanding provisions contained in Article VIII, Section VI, Paragraph I [§ 2-6901] of this Constitution, or in any local constitutional amendment applicable to any county school superintendent, the term of office of county school superintendents, their residence requirements and the method of their election or appointment may hereafter be changed by local or special laws conditioned upon approval by a majority of the qualified voters of the county school district voting in a referendum thereon. County school superintendents shall have such qualifications, powers, duties, and compensation as may be provided by law."

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment prohibits a State from prescribing juror qualifications which require the exercise of judgment on the part of the board or officials charged with the responsibility of composing the jury list?
2. Whether the operation in Taliaferro County of Georgia's statutes pertaining to the selection of members of county boards of education is violative of any right guaranteed to Appellants by the Thirteenth, Fourteenth or Fifteenth Amendments?
3. Whether this Court should render an advisory opinion that "freeholder" qualifications for membership on a county school board are violative of the Fourteenth Amendment?

STATEMENT

According to the 1960 census, Taliaferro County, Georgia, had a population of 3,370 [A. 152] of which Appellants (plaintiffs below and hereinafter referred to as "Plaintiffs") alleged 2,092 to be Negro and 1,273 of the white race [A. 14].¹ Plaintiffs introduced evidence indicating that the voting age population of the county in 1966 was 1,073 Negroes and 917 whites, and that for each race actual voter registration exceeded 100%, with 1,163 Negro and 1,052 white voters included on the rolls [A. 153, 300].²

¹While not a part of the record, it may be of interest to the Court that the most recent population estimate of the Georgia Department of Public Health (dated April 25, 1969) indicates that the current population of Taliaferro County has decreased to 2,500 persons, 1,500 of whom are Negro and 1,000 of whom are white.

²An explanation of the 100% plus voting registration may be found in the fact of population decline and the fact that a substantial number of citizens

Notwithstanding the apparent absence of any racial barrier respecting voting rights in Taliaferro County, however, the racial consciousness, feelings and attitudes of the citizenry run deep. Racial turbulence in 1965 led to litigation between some of the same parties as are involved in the present case. As a result of the claims and counter-claims in that prior action, injunctions were issued against both sides, see *Turner v. Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1965), and when the court required the county board of education to cease its operation of the county school system on a racially segregated basis, all white pupils withdrew rather than attend school with Negroes. Evidence introduced in the present case indicated that in 1967 some 72 of the county's former white pupils were attending a private school within the county with the remainder presumably attending school outside the county [A. 354-359].

As the three-judge district court below correctly noted, the present case is "quasi-sequential" to *Turner v. Goolsby* [A. 397]. Because of the abandonment of the public school system by all white pupils and white teachers, the result was one of an all-white school board administering an all-black public school system [A. 47, 120, 354-357]. It was this situation — the all-white composition of the 5-member school board — which produced the present case. Calvin Turner, one of the plaintiffs in the previous litigation, filed suit for himself, his minor daughter, and other similarly situated voters and school children of the county. The gist of the complaint was that Negroes were being excluded from membership on the school board and consequently deprived of

appear to maintain ties with and voting residence in the county even though they are away most of the time. See A. 300-302.

a voice in school management or affairs. It was alleged that this discrimination was being accomplished by the defendants (i.e. the individual county jury commissioners, grand jurors and members of the county school board) through wrongful county-level administration of State laws pertaining to the appointment of county boards of education. The relationship of the three groups of defendants lies in the fact that under the State constitutional provision and statutory enactments cited by Plaintiffs, the members of the Taliaferro County Board of Education are appointed by the county grand jury which is in turn selected by the county's jury commissioners. The same State school laws, which are more fully discussed in the argument portion of this brief, provide that the county school superintendent (who is also white) shall be elected by the voters of the county. Plaintiffs make no contentions respecting this office.

In addition to their attack upon the allegedly improper county-level administration of State law by the defendant county officials, Plaintiffs, in order to invoke the jurisdiction of a three-judge district court, also inserted allegations that the State constitutional provision and statutory enactments referred to were facially unconstitutional, Plaintiffs underlying and somewhat novel theory being that the facial unconstitutionality resulted from the fact that they *were capable* of being wrongfully administered by local officials [A. 100; Appellants' Brief p. 25]. Although it later found that there was no merit in these three-judge court questions [A. 403], a three-judge court was initially convened to hear the case [A. 18]. The State of Georgia was notified of the attack upon its laws pursuant to 28 U.S.C. § 2284 (a) and promptly moved to intervene as a party defendant

for the limited purpose of asserting the *facial* validity of its enactments [A. 64]. The motion was granted [A. 65].

When the case came on for an initial hearing on January 23, 1968, the State neither introduced evidence nor took part in argument respecting the propriety or impropriety of the administration of its statutes in Taliaferro County by the defendant county officials, this being left to able counsel for the principal parties. The State did urge that if racially discriminatory administration of the State statutes did exist in Taliaferro County, it was not only unauthorized by the statutes, but was indeed in violation of the same, such statutes in and of themselves being both non-discriminatory and constitutional.

Evidence introduced by the parties during the two hearings in the case conflicted on various points. While Plaintiff Turner testified that he could never present his complaints to the school board because he could not find out when it met [A. 187-188], and while it is argued at page 12 of Appellants' Brief that the Board of Education changed the time of its meetings without public notice as required by law, evidence introduced on behalf of the defendant school board members showed that board meetings were held on a regular monthly schedule and that the time and day fixed for such meetings was duly published in the county newspaper except for one instance when publication was late due to the publicly admitted error of the newspaper editor who misplaced a copy of a notice of change in the meeting time which had been received for publication [A. 50, 364-365]. Similarly, the charge that the county board of education was hostile to the needs and desires of the black students

[Appellants' Brief, p. 12; A. 214-217] was met by evidence that expenditure of funds per pupil had increased from \$322.76 to \$434.82 during the period following the withdrawal of all white pupils from the school system [A. 121-122].

It did appear at the initial hearing, on the other hand, that the traverse jury list was composed of 272 Whites and only 56 Negroes, and that the grand jury list was composed of 119 Whites and only 11 Negroes [A. 182-183, 399]. Towards the end of that hearing the District Court indicated that in light of the overall racial composition of the county, it believed that the low percentage of Negro jurors did make out, insofar as the county jury lists were concerned, a prima facie case of systematic racial exclusion [A. 251]. Counsel for the defendant county officials was advised to counsel his clients as to the legal requirements respecting jury selection in the hope that this problem could be cleared up by the time of the next hearing in the case. The court further indicated that although it had doubts as to what it could do about the fact that there were no Negroes on the county board of education, it would be "an act of statesmanship on the part of somebody who is able to get things done" if Negro representation on the school board could be achieved [A. 252-253]. The court went on to observe that the more desirable procedure would be for the citizens of Taliaferro County to solve problems of this nature by themselves, through reconstitution of the county jury lists and granting some relief to the Negro Plaintiffs about the schools [A. 253]. In the words of the court:

"You have got Negro citizens and White citizens and have been there a long time and have got to

live together some way another, so let's try to have a spirit of harmony and work some of these things out, and let's don't let the Courts have to solve everything because that's no solution in the end. The solution has to come out of the hearts of the people, the people that live in a place, so let's try to work that out." [A. 254].

The court's suggestion was heeded by defendants and upon the second hearing, on February 23, 1968, evidence was introduced to show: (1) that the State Superior Court Judge of the judicial circuit which includes Taliaferro County had on his own motion discharged the traverse and grand juries then serving and ordered a revision of both lists [A. 265-266, 272], (2) that the lists were accordingly reconstituted without regard to race by the Jury Commissioners — who secured the assistance of three responsible Negro citizens to aid in revision [A. 274-276, 281], and (3) that at its first meeting the county grand jury confirmed the school board's selection of a Negro citizen to fill one of two existing vacancies on the board [A. 268-269, 348-351]. Plaintiffs, although criticizing the choice of the Negro board member on various grounds, conceded that the new member was a respected citizen of the Negro community as far as moral character was concerned [A. 375].

The procedure used by the Jury Commissioners to reconstitute the jury lists was as follows: They commenced by examining the name of each individual on the county's list of 2,252 eligible voters [A. 87]. Being a small county the six commissioners were in a position collectively to know virtually everyone in the county [A. 249, 275] and as already indicated they had the assistance of three Negro advisors for additional infor-

mation respecting Negro citizens [A. 275]. From the list of all registered voters, the Commissioners proceeded to eliminate the following numbers of persons, without regard to race, for the following reasons:

| | |
|---|-----|
| Under 21 years of age..... | 81 |
| Dead | 94 |
| Persons who requested to be eliminated from consideration | 43 |
| Persons about whom information could not be obtained..... | 226 |
| Poor health and/or old age..... | 482 |
| Away from the county most of the time..... | 533 |
| Miscellaneous (not conforming to statutory qualifications of being intelligent and upright) | 179 |
| Elected officials and then known duplications | 88 |

TOTAL NUMBER ELIMINATED.....1,646

With respect to the statutory qualifications (i.e. miscellaneous), the evidence indicated that the test of "intelligence" was the Jury Commissioners' estimation of whether the individual would be capable of understanding the proceedings in the court room and performing the duties of a juror [A. 283-285]. The test of "upright" was testified as being whether the individual had a good reputation in the community, with information from the Sheriff as to whether an individual had a criminal record being considered in this respect [A. 284-288].

Inasmuch as the 608 names remaining on the list after the above 1,646 persons were stricken were still far more than the number required, such 608 names were then arranged in alphabetical order with the Commissioners taking every other name for preparation of the traverse jury list [A. 267]. Race was not considered in the elimination of specific names from the list for the various reasons cited [A. 290], and it was not until the 304 alternately selected names were placed on the traverse jury list that the Commissioners examined the list to see how many were Negroes and how many were White [A. 267]. They determined that 113 were Negro and 191 were White [A. 267]. Deciding that the fairest way to select two-fifths of the traverse jury list required for placement on the grand jury list would be to draw names by lot, the Jury Commissioners proceeded to draw 121 names, which after being placed on the grand jury list were ascertained to consist of 44 Negroes and 77 white persons [A. 268]. The drawing of the actual grand jury from the names on the grand jury list by the Superior Court Judge was also by lot, and the Judge, not a resident of Taliaferro County, testified that he had no idea as to which selected names were Negro and which were white at the time he drew the same [A. 315]. The result was a grand jury composed of 23 persons, 17 of whom were white, and 6 Negro [A. 79].

While Plaintiffs remained dissatisfied, arguing that those Negroes who had assisted the Jury Commissioners and accepted county office (i.e. as a member of the county board of education) were insufficiently hostile to the county's white officials and hence were "Uncle Toms" [A. 278, 376], the District Court observed from the bench that the Jury Commissioners appeared to have

revised the jury lists in "a very fair way" [A. 392], and through procedures far better than the "key man" system used by many Federal courts [A. 302]. The court pointed out that from the voters list of approximately 50% White and 50% Negro voters, the final result was so close that "it wouldn't take but a switch of 40 people to make it a fifty-fifty jury list" [A. 394].

While permanently restraining and enjoining the Jury Commissioners and their successors in office from systematically excluding Negroes from the grand jury system in Taliaferro County [A. 406], the court also held that *as revised* the grand jury list was neither unconstitutional or illegal. In rejecting Plaintiffs' attacks upon the facial constitutionality of the State constitutional provision and statutes, the court declared:

"The court finds and concludes that the constitutional provision and the statutes in question are not unconstitutional on their face or as applied. There is nothing in the constitutional provision or in the statutes which contemplates or permits the resulting systematic exclusion from the grand juries. The standards are not inadequate. The facts showed systematic exclusion in the administration of the grand jury system prior to the revision but this resulted from the administration of the system and not from the constitutional provision and statutes under attack. . . . There is thus no merit in the three-judge District Court questions presented" [A. 403].

PART II

ARGUMENT

1. **The Fourteenth Amendment does not prohibit a State from prescribing juror qualifications which require the exercise of judgment on the part of the board or officials charged with the responsibility of composing the jury list.**

In its 1968 revision of the procedures used to select grand and traverse jurors in Georgia, the General Assembly put forth its best efforts to insure that county jury lists would fairly reflect a cross-section of the county's citizenry. To start with, it changed the name source for potential jurors from the long used books of the county tax receiver to the official registered voters' list. This, it was thought, would avoid exclusion of the poor. The General Assembly then specified not only that the jury list composed from this source should be a "fairly representative cross-section of the intelligent and upright citizens of the county," but that if it appeared to the jury commissioners that the jury list so composed was not a fairly representative cross-section they must:

"... supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly representative thereon." [Ga. Code Ann. § 59-106]

Notwithstanding this seemingly clear intent and attempt of the State to avoid exclusion of *any* significantly identifiable group from jury duty, however, Negro Plaintiffs, in instituting their action against local county jury

commissioners who failed to adhere to the State's mandate, declined to seek a remedy through enforcement of the statute in the State courts. Instead they attacked the statute itself on the ground that it was *facially* unconstitutional as well as wrongfully administered in Taliaferro County, Georgia.

The constitutional garb of Plaintiffs' somewhat novel attack upon the facial validity of Ga. Code Ann. § 59-106, as amended, is that it is *capable* of being wrongfully administered because it contains elements of vagueness. While the so-called "vagueness" contention will be considered shortly, we wish to declare at the very outset that it is the State's position this contention really presents an illusory issue which only tends to obfuscate the real question presented. Plaintiffs' "capacity" argument, if it has any merit at all, is equally applicable to any statute which calls for an exercise of judgment on the part of a public official or administrator. Thus the question which is really before this honorable Court is whether the Fourteenth Amendment prohibits a State from prescribing any juror qualifications or standards requiring an exercise of judgment on the part of the board, commissioners or officials charged with the responsibility of composing the jury list. This question is obviously of import beyond the borders of the State of Georgia.³

³If Plaintiffs' "capacity" argument is valid, it is difficult (in view of the inherent "vagueness" of the English language) to see how any existing statute pertaining to jury selection can survive. All would appear to be *capable* of being wrongfully administered. See, e.g. 82 Stat. 52, 28 U.S.C.A. § 1865 as well as the various State statutes referred to at pp. 12-13 of Plaintiffs' Jurisdictional Statement. The vagueness of the Federal statute is hereinafter discussed.

(a) *The illusory "vagueness" issue.*

It is the current fashion, whenever a disliked statute is attacked, to include an averment that it is "unconstitutionally vague." This is quite understandable. A plausible argument can invariably be made in support of vagueness contentions, and plaintiffs can always hope that if they are able to convince a judge that a statute is bad or unwise they may be able to induce him to declare it unconstitutional on this "catch-all" peg. The plausibility of any plaintiff's argument stems from the fact that most words, virtually all sentences, and surely all statutory and constitutional provisions — particularly those relating to an exercise of judgment or discretion by public officials or bodies — are to greater or lesser degree susceptible of differing interpretations and hence "vague and ambiguous." Such lack of certainty unfortunately is as true of law as it is of life. Where would the law of tort be without its "reasonable man" and "ordinary care," the law of contract be without "consideration," or criminal law be without "malice" and "sanity." Nor should it be overlooked that the constitutional provisions upon which Plaintiffs rely in the instant case are the Fourteenth Amendment's "equal protection" and "due process" clauses. Quite obviously, if the mere presence of vagueness, uncertainty and ambiguity were to be fatal to the validity of legal concepts, we would have no law. If it were to be fatal to the validity of statutory enactments, we similarly would have no statutes and perhaps the Federal Constitution too would have to be declared too vague to stand.

Fortunately, however, such is not the case. The fact that a statute may require interpretation, that it may be

difficult to interpret, or that it is susceptible of different interpretations, does not render it *unconstitutionally* vague. The universal and indeed quite *necessary* rule is that if a statute is susceptible of any sensible construction at all, it is the duty of the courts to fill in such gaps as may exist and supply such interpretation and construction as may be required to save the law, with due regard being given to its purpose and the intent of the legislature. See, e.g. 82 C.J.S. *Statutes* § 68(c), pp. 118-19. As stated by this Court in *Screws v. United States*, 325 U.S. 91, 100 (1945):

"Yet if the Act falls by reason of vagueness so far as due process of law is concerned, there would seem to be a similar lack of specificity when the privileges and immunities clause * * * and the equal protection clause * * * of the Fourteenth Amendment are involved. *Only if no construction can save the Act from this claim of unconstitutionality are we willing to reach that result.*" (Italics added.)

We find it hard to believe that Plaintiffs can seriously maintain that the words "intelligent and upright" (it is these words respecting juror qualifications upon which their constitutional attack on Ga. Code Ann. § 59-106 is primarily based) render the statute facially unconstitutional *because of vagueness*. Both of the words which Plaintiffs dislike are of common usage in the English language and both are contained in all standard dictionaries. Webster defines "intelligent" as having the power of reflection or reason and "upright" as morally correct, honest and just. *Webster's Third New International Dictionary* (3d Ed. 1961), pp. 1175, 2518. With respect to legal proceedings the terms are sim-

ilarly defined in Words and Phrases as the ability of a juror to understand and properly dispose of a case on trial⁴ and soundness of moral principle and character.⁵ Certainly the jury commissioners of Taliaferro County understood the words in these terms when they reconstituted the jury list pursuant to the trial court's direction. The chairman testified that an "upright" citizen was one who enjoyed a good reputation in the community, with information from the Sheriff as to whether an individual had a criminal record being considered in this matter [A. 284-288]. The chairman further testified that the test of "intelligence" was whether the individual would be capable of understanding the proceedings in the court room and performing the duty of a juror [A. 283-285]. Even more recently the Supreme Court of Georgia, in rejecting the same "vagueness" attack which Plaintiffs make here, said essentially the same thing in other words when it declared that under Ga. Code Ann. § 59-106:

"An intelligent person is one possessed of ordinary information and reasoning facility." *Sullivan v. State*, _____ Ga. _____ (No. 25147, decided May 8, 1969).

Surely the phrase "intelligent and upright," as employed in Ga. Code Ann. § 59-106, is as clear as the "suitable in character and intelligence" which this honorable Court indicated might possibly be a *minimum* qualification for jurors in *Brown v. Allen*, 344 U.S. 443, 474 (1943). Surely it is as clear as the concept of "general reputation in the community" which can influence a jury as to whether an accused shall be hanged or set

⁴21A Words & Phrases, *Intelligent*, p. 718-719.

⁵43 Words & Phrases, *Uprightness*, p. 447.

free (and where specifics to further explain or illustrate the term are expressly prohibited). See 22A C.J.S. *Criminal Law* § 676; 32 C.J.S. *Evidence* §§ 434, 436.⁶ We think the terms are a lot clearer than the period of "during good behavior" during which Federal judges are permitted to hold their appointive offices. See U.S. Const. Art. III, Section I; 28 U.S.C. §§ 44, 134. In short, we think that Plaintiffs "vagueness" contentions are wholly devoid of merit and are illusory only. The terms "intelligent and upright" are sufficiently plain and simple so as to really obviate any necessity for judicial interpretation or construction at all, but, even were this not so, it is abundantly clear that the terms are easily capable of judicial interpretation and construction, and hence under *Screws* are not subject to serious attack on the ground of being unconstitutionally vague.

(b) *Capacity for wrongful administration.*

According to Plaintiffs, the vice of the alleged vagueness is that it renders the statute capable of being administered in a wrongfully discriminatory manner. Under this theory, it would seem to follow that an actual showing of unconstitutional administration of the statute must *ipso facto* cause the statute to be declared unconstitutional. We think the court below accurately placed its finger on the difficulty with this line of reasoning when it observed from the bench that Plaintiffs' argument, if valid, could be used to "knock out every statute" [A. 100-101]. Because Plaintiffs' "capacity" argument is so clearly applicable to any juror qualification requiring

⁶This is particularly significant when one considers that the required level of clarity and precision is generally said to be, as it ought to be, higher for criminal than for civil statutes. See, e.g., *Teague v. Keith*, 214 Ga. 853, 854, 108 S.E.2d 489 (1958); 82 C.J.S. *Statutes*, § 68, p. 109, fn. 33.

an exercise of judgment or discretion on the part of the board or officials charged with the responsibility of composing a jury list, we think we need not argue further that what Plaintiffs really are contending is that something in the Fourteenth Amendment precludes the existence of any juror qualifications or standards requiring an exercise of judgment. Noting that until now the courts appear to have experienced no great difficulty in distinguishing between facial validity and wrongful administration of statutes pertaining to jury selection, and in fashioning a proper remedy to cure the letter without disturbing the former, see e.g. *Labat v. Bennett*, 365 F.2d 698, 715 (5th Cir. 1966), we will therefore proceed to discuss the constitutionality of those juror qualifications which do require an exercise of judgment on the part of officials charged with the responsibility of juror selection, with particular emphasis upon those qualifications of intelligence and character which have become such an integral part of juror selection in both the Federal and State systems.

(c) *Constitutionality of intelligence and character qualifications.*

The reaction of the district court to Plaintiffs' attack upon juror qualifications of "intelligence" was that the Seventh Amendment is still in the Constitution and that a litigant was entitled to have a juror who was capable of understanding jury proceedings [A. 392]. Only last year this honorable Court held that trial by jury was so fundamental to the American Scheme of Justice as to cause the right, as guaranteed to Federal criminal defendants by the Sixth Amendment, to be similarly guaranteed to State criminal defendants by the "due

process" clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 148-150 (1968). We cannot conceive that the Court will declare jury trials to be "basic in our system of jurisprudence" and "fundamental to the American scheme of justice" in 1968 and then proceed to hold that jury service cannot be restricted to persons having the capacity and character to act as fair and impartial jurors in 1969. Certainly this has not been the view of the Court in the past. In *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880), it was observed in striking a statute which singled out and expressly denied colored citizens the right and privilege of serving as jurors:

"We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. *It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.* We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose." (Italics added.)

In the same vein, this Court reiterated in *Brown v. Allen*, 344 U.S. 443, 473-474 (1953):

"States should decide for themselves the quality of their juries as best fits their situation so long as the classifications have relation to the efficiency of the jurors and are equally administered.

Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, *so long as the source reasonably reflects a cross-section of the population suitable in char-*

acter and intelligence for that civil duty." (Italics added.)

We think that the emphasized portion of the foregoing language could well be taken as indicating that such intelligence and character qualifications for jurors as are contained in Ga. Code Ann. § 59-106 may be affirmatively required by the Sixth and Seventh Amendments to the United States Constitution — notwithstanding the fact that such qualifications are subject to abuse because of the fact that somewhere along the line some individual or individuals must exercise judgment and render a decision. Surely this view would be more in harmony with the spirit and utility of the Sixth and Seventh Amendments than the view expressed by Plaintiffs that intelligence and character cannot be used as a juror qualification merely because these terms call for the exercise of judgement and thus afford an opportunity for racial discrimination. It is noteworthy that recent Federal legislation respecting jury selection also deems it to be essential that jurors be sufficiently intelligent so as to have the capacity to understand judicial proceedings. See, 82 Stat. 58 (28 U.S.C.A. § 1865). Indeed all of the things which Plaintiffs attack in Georgia's statute (i.e. vagueness and capacity for wrongful administration) are abundantly present in 28 U.S.C.A. § 1865. Not only does the Federal statute contain a requirement that a juror be able to read, write, and understand the English language "with a degree of proficiency sufficient to fill out *satisfactorily* the juror qualification form," but it expressly provides for exclusion of anyone who "is incapable, by reason of mental or physical infirmity, to render *satisfactory* jury service." Hence the Federal statute too calls for the exercise of judgment and a deci-

sion regarding its equally vague terms for measurement of intelligence and capacity to perform as a juror.

But whether or not intelligence and character requirements are constitutional mandates for jury service, it would at least seem clear that such minimal criteria are permitted to the States under the Fourteenth Amendment. See *Brown v. Allen*, 344 U.S. 443 (1953); *Strauder v. West Virginia*, 100 U.S. 303 (1880).⁷ For this reason, we think that Plaintiffs' attack upon Georgia's jury selection statute, which if successful would equally strike the Federal as well as most, if not all, State jury selection statutes, is without merit.

2. The operation in Taliaferro County of Georgia's statutes pertaining to the selection of members of county school boards of education is not violative of any right secured to Appellants by the Thirteenth, Fourteenth or Fifteenth Amendments.

While Plaintiffs maintained below that the various Georgia statutes relating to the selection of county school board members were facially unconstitutional, they appear to have abandoned this position on appeal. It is now their contention only that such statutes, *as administered in Taliaferro County*, operate to dilute Negro participation in the holding of political office and consequentially in the management and administration of the county school system. See Appellants' Brief, pp. 38-48.

⁷See also, *Swain v. Alabama*, 380 U.S. 202 (1965), where the Court found no fault with an Alabama statute which in much broader language than is contained in Ga. Code Ann. § 59-106 placed on the jury rolls all male citizens in the community over 21 who:

"... are reputed to be honest, intelligent men and are esteemed for their integrity, good character and sound judgment."

Although the State's intervention was for the limited purpose of asserting the *facial validity* of its statutory enactments, since Plaintiffs now apparently are arguing that the operation of the law should be suspended in Taliaferro County, we think it may be appropriate to observe in passing that we find considerable difficulty in our attempt to understand just what Plaintiffs are asking of the Court respecting the holding of county political office — such as school board membership — in Taliaferro County. Plaintiffs stated below that they were not contending that the Constitution requires county school board members to be elected by the voters rather than appointed by the county grand jury [A. 158]. Nor do we understand Plaintiffs to contend that where the Negro population is ten, fifty or any other fixed percentage of the county's citizenry, the appointing authority must appoint any fixed percentage of Negroes to appointive county political offices. On the other hand, it does appear that the essence of Plaintiffs' discontent is the fact that formerly none and now only one of their race is a member of the Taliaferro County Board of Education. Arguing originally that their complete lack of representation on the school board wholly excluded Negroes from management and administration participation in county school affairs, Plaintiffs proceeded to argue after a Negro citizen had been appointed to the board, that although the appointee was a respected citizen of the Negro community as far as moral character was concerned [A. 375], he was not the right type of Negro insofar as they were concerned (they considered him an "Uncle Tom") [A. 376].

As already indicated Plaintiffs do not state what they expect of the district court. One would have thought

that they had secured relief through the court ordered recomposition of the grand jury list of Taliaferro County. One of the first acts of the newly created grand jury was to fill one of the two then existing vacancies on the school board by appointment of a Negro citizen of the county. The injunction issued by the court respecting future exclusion of Negroes from the county jury list would seem to show promise of continued and probably increased Negro representation on the board in the future. Plaintiffs' none the less indicate in their Brief that they believe that the district court should fashion some unspecified additional remedy which would apparently require that State law respecting selection of county school board members be held in abeyance in Taliaferro County for an unspecified period of time. Do Plaintiffs' suggest that present office holders be ordered out of their offices by the district court so that they can be replaced by Negroes? Must the court reserve a fixed number or any specified county political offices in the county be reserved for Negroes only? It is difficult to reply to unknown demands.

While Plaintiffs confine their argument solely to membership on the county board of education, we think it essential to point out that the county political office most intimately concerned with and possessing the greatest power over the day to day operation and administration of a county school system in Georgia is not that of membership on the school board. The most influential position is the office of county school superintendent and this is an elective office in Taliaferro County pursuant to Article VIII, Section VI, Paragraph I of the Consti-

tution of the State of Georgia of 1945 (Ga. Code Ann. § 2-6901).⁸

In *Snowden v. Hughes*, 321 U.S. 1 (1944), this Court pointed out that the right to hold a state political office was derived solely from the relationship of the citizen to his state, as established by state law. In view of the totality of the situation we respectfully submit that the relief already granted by the three-judge district court is adequate and that the operation in Taliaferro County of state law pertaining to the selection of county school boards members need not be suspended or otherwise altered by the district court.

3. The Court should deny Appellants' request for an advisory opinion that a "freeholder" qualification for membership on a county school board is violative of the Fourteenth Amendment.

Article VIII, Section V, Paragraph I of the Constitution of the State of Georgia of 1945 (Ga. Code Ann. § 2-6801), as well as Ga. Code Ann. § 32-902, provides that members of county boards of education shall be "freeholders."⁹ Plaintiffs attack this provision under the equal protection clause of the Fourteenth Amendment on the ground that exclusion of non-freeholders from

⁸It may further be noted that the State constitutional provisions which provide generally for the election of county school superintendents and appointment of school board members by the county grand jury can be altered by local or special law conditioned upon approval by a majority of the qualified voters of the school district voting in a referendum thereon. See Article VIII, Section V, Paragraph II (Ga. Code Ann. § 2-6802) and Article VIII, Section VI, Paragraph II (Ga. Code Ann. § 2-6902) of the Constitution of the State of Georgia of 1945.

⁹*Black's Law Dictionary* (4th Ed. 1951), p. 793 defines a "freeholder" as one having title to realty. The term is similarly described in 28 Am.Jur.2d, *Estates* § 8 as any estate existing in, or arising from real property.

this county political office constitutes an arbitrary and unreasonable classification.

It is respectfully submitted that Plaintiffs attack wholly fails to present a "case or controversy" within the meaning of Article III, Section II of the United States Constitution. This Court has repeatedly said that litigants are not entitled to advisory opinions on disputes which are of a hypothetical or abstract nature. E.g. *Barr v. Matteo*, 355 U.S. 171, 172 (1957); *Eccles v. Peoples Bank of Lakewood Village, California*, 333 U.S. 426, 432 (1948); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). In the present case, there is no evidence whatsoever to indicate that the "freeholder" requirement has been or is being used to exclude Plaintiffs or anyone else, whether black or white, from membership on a county school board either in Taliaferro County or anywhere else within the State of Georgia. Plaintiffs' concession that many of Taliaferro County's Negro citizens (including Plaintiff Calvin Turner) did in fact own real property [A. 97] would seem to negate even the "capacity" of this qualification for racially discriminatory use in the county. The question is indeed so completely hypothetical as to prevent Plaintiffs from rising to the higher but ordinarily still insufficient position of asserting constitutional rights on behalf of others who are deprived of the same. See, e.g. *Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General*, 341 U.S. 123, 150-152 (1951) [concurring opinion].

The aura of unreality surrounding Plaintiffs' "freeholder" argument is also seen when one considers the fact that neither the constitutional provision nor the statute containing this qualification specifies any minimum quantity or value for the property the "freeholder"

must hold. Even if this qualification were to be shown to be anything more than a dead letter, it would still seem that an individual who was a serious aspirant for the office of county school board member would be able to obtain a conveyance of the single square inch of land he would require to become a "freeholder."

Finally, it may be noted that even if the "freeholder" issue had properly been raised by someone who had in fact been unable to obtain the necessary "square inch," and as a result had been denied public office, Plaintiffs' position would be contrary to law. So far as we have been able to determine the courts, in the absence of any provision to the contrary in the *State* constitution, have uniformly upheld property qualifications for political office. See e.g. *Becraft v. Strobel*, 287 N.Y.S. 22, 29 (1936), *aff'd* 274 N.Y. 577, 10 N.E.2d 560 (1937); *State v. McAllister*, 28 W.Va. 485, 18 S.E. 770, 773 (1893). In *Vought v. Wisconsin*, 217 U.S. 590 (1910), where a Wisconsin statute requiring jury commissioners to be "freeholders" was attacked as a denial of "due process" and "equal protection" by individuals indicted by grand jurors who had in turn been appointed by such freeholder jury commissioners, this Court thought the federal question to be so clearly without merit as to justify dismissal on jurisdictional grounds. Similarly in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) this Court said in so many words that a State could constitutionally confine jury service to freeholders.

While the desirability and wisdom of "freeholder" requirements for State or county political office may indeed be open to question, we think that insofar as the

constitutionality of the same is concerned, 42 Am.Jur. *Public Officers* § 49 is entirely correct when it states:

"Undoubtedly a legislature has power to impose a property qualification upon office holders."

CONCLUSION

For the reasons stated herein the instant appeal should be dismissed for want of jurisdiction or in the alternative the judgment of the United States District Court for the Southern District of Georgia should be affirmed.

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FILE COPY

SEP 16

JOHN F. DAVIS

IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 23

CALVIN TURNER, *et al.*,

Appellants,

—v.—

W. W. FOUCHE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

APPELLANTS' REPLY BRIEF

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IN THE
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OCTOBER TERM, 1969

No. 23

CALVIN TURNER, *et al.*,

Appellants,

—v.—

W. W. FOUCHE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

APPELLANTS' REPLY BRIEF

I.

In its Brief, the State of Georgia expresses the view that Ga. Code Ann. §59-106, which authorizes jury commissioners to select for jury service only persons whom the commissioners believe are "intelligent and upright", provides sufficiently precise guidance as to which "citizens of the County" are to be included and which excluded from the jury list. In support of this conclusion the state quotes a decision of the Supreme Court of Georgia ("An intelligent person is one possessed of ordinary information and reasoning facilities," *Sullivan v. State*, — Ga. —, 168 S.E.2d 133 (1969)) and the chairman of the jury commission who testified that an "upright" citizen is one who enjoys a good reputation in the community (Brief p. 16).

It is also urged that the English language always contains room for varying interpretations, and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment contain language more indefinite than Ga. Code Ann. §59-106.

Appellants have no quarrel with the general notion that some uncertainty as to meaning is inevitable in the drafting of legislative enactments. It is quite another matter, however, to conclude that officials such as jury commissioners can non-arbitrarily distinguish between adults on the basis of whether they are "intelligent and upright"—statutory tests which are nowhere given content or objectively defined. Assuming good faith on the part of the commissioners—an assumption which this record refutes—neither the statute, the practice of the commissioners under it, nor decisions of the Georgia courts, adopt standards for exclusion or inclusion which do more than reiterate the open-ended, subjective, discretion conferred by the words, "intelligent and upright." Cf. *Edwards v. South Carolina*, 372 U.S. 229 (1963). The statute simply does not offer guidance to assist one determining whether any particular individual is qualified for jury service. Guidance to assist one determining whether particular individuals are qualified for jury service is not given by replacing one set of vague and overbroad terms with another.¹ What, for example, is one to make of the notion that a Georgia juror is "intelligent" if possessed of "ordinary information"

¹ Even the dictionary definition of "intelligence" reflects some of the confusion encountered by any definition which does not rely on an objective standard: "Psychologists still debate the question whether intelligence is a unitary characteristic of the individual or a sum of his abilities to deal with various types of situation." Webster's New International Dictionary (2d Ed.).

The word "upright" is defined by Webster's as being "morally correct." A standard more likely to reflect the prejudices of the person making the selection is difficult to imagine.

and "upright" if "honorable, honest and will do right as he sees it"? ² *Sullivan v. State*, *supra* at 137. The Georgia Supreme Court opinion in *Sullivan v. State* also states that "No particular degree of intelligence is required by this statute. Idiots, morons, and insane persons are not intelligent and would not qualify." There is no suggestion, however, that §59-106 excludes only the classes of mentally disabled persons enumerated. And the statute betrays no such intent, although it would be an easy matter to write a statute which confined the discretion of the commissioners to excluding such classes of persons from service, see e.g., North Carolina Gen. Stat. §9-3 (1967); Ala. Code Tit. 30 §21 (1966). Perhaps, the failure of the Georgia Legislature to define those characteristics which amount to a disqualification might pass constitutional muster if the commissioners themselves, or the Georgia courts, construed Ga. Code Ann. §59-106 in a more definite manner—as, for example, this Court construes the Fourteenth Amendment. But nothing of this sort has occurred and Ga. Code Ann. §59-106 remains as vague and over-broad as when it was written. (See A. 36).

Another branch of the State's argument is that a statute may not be invalidated because of a capacity for wrongful administration attributable to its vagueness or overbreadth.

² The Georgia Supreme Court in *Sullivan* also relies on a passage in this Court's opinion in *Brown v. Allen*, 344 U.S. 443, 474 (1953) to the effect that to satisfy federal constitutional requirements a jury selection statute need only reflect "the cross-section of the population suitable in character and intelligence for that civic duty." The court takes this to mean that a statute which uses the words "intelligent" and "upright" is thereby constitutional. In doing so it confuses the constitutionally acceptable goal of seeking jurors of intelligence and character (as stated in *Brown v. Allen*) with the means of reaching that goal which, to satisfy Fourteenth Amendment requirements, must contain a sufficiently definite test of eligibility not to invite capricious distinction between individuals or to serve as a mask for racial discrimination.

It is said that all statutes are capable of wrongful administration, and, therefore, that the only remedy for the use of language such as "intelligent and upright" to exclude Negroes in Georgia from jury service is to obtain injunctive relief in every case against particular jury commissioners who discriminate racially. We will not here repeat our discussion of the reasons why the language of Ga. Code Ann. §59-106 provides a particular and severe threat to non-racial selection of jurors in Georgia, or the reasons why a general injunction against racial selection is of minimal value as long as excessive discretion vested in the commissioners provides an easy justification for what is actually racial exclusion. These matters are set forth in some detail in Appellants' Brief, pp. 30-37. We point out, however, that the rule that a statute violates the Fourteenth Amendment when it confers standardless discretion upon public officials to make up the "law" in every case has been consistently applied by this Court, See *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966); *Hague v. CIO*, 307 U.S. 406 (1939). Indeed, the State's contention was rejected by the Court in *Louisiana v. United States*, 380 U.S. 145, 153 (1965):

The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints. See, e.g., *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 65 L.ed. 516 41 S Ct 298, 14 ALR 1045. Squarely in point is *Schnell v. Davis*, 336 U.S. 933, 93 L.ed 1093, 69 S Ct 749, affirming 81 F. Supp. 872 (D.C. S.D. Ala.), in which we affirmed a district court judgment striking down as a violation of the Fourteenth and Fifteenth Amendments an Alabama constitutional pro-

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vision restricting the right to vote in that State to persons who could "understand and explain any article of the Constitution of the United States" to the satisfaction of voting registrars. We likewise affirm here the District Court's holding that the provisions of the Louisiana Constitution and statutes which require voters to satisfy registrars of their ability to "understand and give a reasonable interpretation to any section" of the Federal or Louisiana Constitution violate the Constitution. And we agree with the District Court that it specifically conflicts with the prohibitions against discrimination in voting because of race found both in the Fifteenth Amendment and 42 USC §1971 (a) to subject citizens to such an arbitrary power as Louisiana has given its registrars under these laws.

As with voting registrars in Louisiana, use by the commissioners of indefinite eligibility tests to exclude Negroes from jury service is not merely an abstract possibility. Georgia jury commissioners in Taliaferro County and elsewhere have consistently misapplied their authority for the forbidden purpose of excluding Negroes.³ *Cobb v. Georgia*, 389 U.S. 12 (1967) (per curiam) (Bibb County); *Sullivan v. Georgia*, 390 U.S. 410 (1968) (per curiam) (Lamar County); *Anderson (and Hinton) v. Georgia*, 390 U.S. 206 (1968) (per curiam) (Crisp County); *Jones v. Georgia*, 389 U.S. 24 (1967) (per curiam) (Bibb County); *Sims v. Georgia*, 389 U.S. 404 (1967) (per curiam) (Charl-

³Of course, use of the "intelligent and upright" qualification is not the only manner by which Georgia jury commissioners have discriminated against blacks in jury selection. Until recently, commissioners also employed racially separate tax books to discriminate in selection. The point is that the "intelligent and upright" qualification provided a ready opportunity for discrimination which Georgia jury commissioners are inclined to take advantage of by custom and practice.

ton County); *Whitus (and Davis) v. Georgia*, 385 U.S. 545 (1967) (Mitchell County); *Reece v. Georgia*, 350 U.S. 85 (1956) (Cobb County); *Williams v. Georgia*, 349 U.S. 375 (1955) (Fulton County); *Avery v. Georgia*, 345 U.S. 559 (1953) (Fulton County); *Vanleeward v. Rutledge*, 369 F.2d 584 (5th Cir. 1966) (Muscogee County); *Whippler v. Dutton*, 391 F.2d 425 (5th Cir. 1968) (Bibb County); *Cobb v. Balkcom*, 339 F.2d 95 (5th Cir. 1964) (Jasper County); *Pullum v. Greene*, 396 F.2d 251 (5th Cir. 1968) (Terrell County); *Moore v. Dutton*, 396 F.2d 783 (5th Cir. 1968) (per curiam) (Camden County); *Whippler v. Balkcom*, 342 F.2d 388 (5th Cir. 1965) (Bibb County); *Whitus v. Balkcom*, 333 F.2d 496 (5th Cir. 1964) (Mitchell County); *Gamble v. Grimes*, XIA Race Rel. L. Rep. 2028, (N.D. Ga. 1966) (Fulton County); *Broadway v. Culpepper*, — F. Supp. — (No. 904, M.D. Ga. 1969) (Baker County).⁴

⁴ The requirement that Georgia jurors be intelligent and upright apparently dates from the Georgia Constitution of 1868 which authorized the General Assembly to "provide by law for the selection of upright and intelligent persons to serve as jurors." One year after adoption of the Constitution of 1877 (which authorized "the selection of the most experienced, intelligent and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors".) Georgia adopted "An Act to carry into effect Paragraph 2, Section 18, Article 6 of the Constitution of 1877 so as to provide for the selection of the most experienced, intelligent and upright men to serve as grand jurors, and of intelligent and upright men to serve as traverse jurors and for the drawing of juries." (Acts 1878-79, pp. 34-35)

It is of course significant that the intelligent and upright requirement came into Georgia law at a time when southern states freely adopted vague and overbroad laws as "nothing more than a mask for excluding the names of any and all Negroes." See Carter, *Scottsboro* (Louisiana State University Press (1969)) pp. 196-97; *Louisiana v. United States*, 380 U.S. 145 (1965); *United States v. Mississippi*, 380 U.S. 128 (1965). Of the political situation in Georgia, in 1868, a distinguished historian has written "In September, 1868, the Georgia Legislature formally declared all Negro members ineligible to sit in that body . . . No other former confederate state put on such a display of incorrigibility." Franklin, J. H., *Reconstruction After the Civil War* (University of Chi. Press (1961)) pp. 131-133.

The general injunction against racial discrimination which the district court granted, and which appellees contend is sufficient, cannot eliminate persistent discrimination on such a scale. As the Court recognized in *Louisiana v. United States*, 380 U.S. at 152, a vague and overbroad statute "practically places . . . [the commissioners] decision beyond the pale of judicial review." Nor are proper jury selection standards difficult to ascertain and administer. See 1968 Jury Selection and Service Act, Public Law No. 90-273, 28 U.S.C. §§1861 et seq. The suggestion in the State's Brief (p. 13) that 28 U.S.C. §1865 gives a federal judge similar power to a Georgia jury commissioner is unpersuasive. Under the Jury Selection and Service Act, the requirement that one must "read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form", 28 U.S.C. §1865 (b) (2), is a determination made on the objective basis of "information provided on the juror qualification form and other competent evidence" 28 U.S.C. §1865 (a).⁵ Appellees further contention that somehow Georgia's subjective eligibility standards are required by the Sixth and Seventh Amendment falls of its own weight. Appellants do not contend that a state cannot ensure that its jurors are qualified for the work at hand, but rather that the standard used to select eligible jurors must be sufficiently clear to provide for minimum regularity and accountability. The adoption of words such as "intelligent and upright", as to which each person may have a different view, does not satisfy the Fourteenth Amendment for it leaves a citizen's eligibility to the

⁵ Appellees overlook that the Federal Jury Selection and Service Act requires that each circuit adopt a plan of selection which will ensure objective random selection rather than the subjective character and intelligence judgments which were permitted by prior law. See United States Code Congressional and Administrative News, 90th Congress, 2nd Sess., pp. 748-763.

"passing whim or impulse" of a jury commissioner, *Louisiana v. United States*, *supra* at 380 U.S. 153.

II.

Neither the State of Georgia, nor remaining appellees, make an attempt to deny that racial discrimination infected the process of selection of Taliaferro County school board members prior to the institution of this litigation. Appellees appear to contend, however, that appellants are not entitled to relief because a Negro was appointed to fill one of two vacancies on the five-man school board and his appointment was later ratified, as required by Ga. Code Ann. §2-6801, by a recomposed grand jury.

The short answer to appellees' contention is that Negroes were excluded in the selection of the new grand jury which filled the two vacancies. (See Appellants' Brief pp. 25-38). But even if the two vacancies had been filled by a constitutionally selected body, this would not have remedied the undoubted unconstitutional selection of the remaining three school board members for they were selected by the previous grand jury—from which Negroes were excluded in even more gross fashion than on the recomposed grand jury. At a minimum, then, the district court should have declared that the school board was selected in violation of the Fourteenth Amendment, ordered its membership vacant, and required the entire board selected on a non-racial basis, *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967). Nor were striking down the offensive system of selection or vacating the membership of the board the only remedies available to the district court. Given the situation in Taliaferro County where an all-white board administered an all-Negro school system, the district court could have—if it found such relief temporarily warranted to

remove the past effects of discrimination—"appropriately restricted control of the school to Negro parents until whites demonstrated the kind of good faith which would render their participation no longer a danger to Negroes, say by reversing the withdrawal of their children from the system." (Appellants' Brief pp. 45-48); cf. *Carr v. Montgomery County Board of Education*, 395 U.S. 225 (1969). Or the district court could have reappointed a receiver to operate the public schools, a step which it had found necessary in earlier litigation between members of the Negro community and public officials in this county. *Turner v. Goolsby*, 255 F. Supp. 724 (S.D., Ga., 1965). The district court failed to select one, or several, of these courses because it concluded—erroneously, appellants contend—that the addition of one Negro member to the school board was sufficient to reform an unconstitutional system of selection which enables whites to control a school system that no white children attend.

It should be noted the county school board appointment process begins when a superior court judge appoints the six jury commissioners responsible for selection of the jury lists. Candidates for superior court judgeships are nominated and elected by the voters of Taliaferro County in addition to the voters of five other counties, Ga. Code Ann. §24-2501, 2-3802. (Prior to 1966 the superior court judges were elected by all the voters of the State, see *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964). The result is that at no point in the system do Taliaferro Negroes have an "effective voice" in the process of school board selection, for the official (the superior court judge) whose appointments (of jury commissioners) determine who will select the school board is only remotely responsible to Taliaferro county black voters. Cf. *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 627 n. 7,

628-29; *Avery v. Midland County Texas*, 390 U.S. 474, 484 (1968).

Appellees also appear to dispute that the district court should initially fashion the particular relief appropriate to remedy the effects of past discrimination in selection of the school board. The general practice, however, has been to leave matters of this sort to the discretion of the district court in the first instance. *Green v. School Board of New Kent County*, 391 U.S. 430 (1968); *Griffin v. School Board of Prince Edward County, Virginia*, 377 U.S. 218 (1964); *Powell v. McCormack*, 395 U.S. 486, 550 (1969). Given the district court's familiarity with the operation of the school system in the county, there is no reason why a different practice should apply here.

III.

This Court's decisions last term in *Cipriano v. City of Houma*, 395 U.S. 701 (1969) and *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), make perfectly plain that Article VII, §V, Par. 1 of the Georgia Constitution and Ga. Code Ann., §§2-6801; 32-902, 902.1 violate the Fourteenth Amendment by excluding from membership on a Georgia school board persons who do not own real property. Cf. *Williams v. Rhodes*, 393 U.S. 23 (1968).

In *Kramer*, a New York statute denied the right to vote in a school board election only to those who were not owners or lessees of real property within the district or parents and guardians of school children. Nevertheless, the statute violated the Equal Protection Clause because there was no proof that it was necessary to promote a compelling state interest, and no showing that the persons permitted to vote had any greater interest in school affairs than those who were not permitted to vote. In *Cipriano*, the city main-

tained that real property owners had a special interest in an election held to approve the issuance of a municipality's utility revenue bonds (because property values were affected by the outcome) and that this interest was sufficient to warrant exclusion of others. In striking down the Louisiana constitutional provision involved, this Court held that all utility users—not only property owners—were affected by the character of utility service.

As appellants read the State's Brief, Georgia has declined to state a specific justification for the exclusion of non-freeholders from school board membership such as that freeholders are "directly affected", *Kramer, supra* 395 U.S. at 631, or that they have a "special pecuniary interest" in the operation of the schools which others do not have, *Cipriano, supra*, 395 U.S. 704. The state concedes that "the desirability and wisdom of the 'freeholders' requirements for state or county political office may be indeed open to question" (p. 26) and merely asserts the right of a legislature to impose property qualifications if it wishes. Indeed, because the Georgia law reflects no attempt to non-arbitrarily restrict service to those affected, such an attempt to justify the exclusion would fail. While it might, at most, be argued that a property owner has an infinitesimally greater financial interest in the costs of the school system than a non-property owner, any parent plainly has a far greater concern in board membership than any non-parent, regardless of whether he is a freeholder. Georgia law, however, makes eligible only those parents who own real property.

The state also argues that the constitutionality of the freeholder restriction is not justiciable. The district court, however, granted the petition for intervention, without objection from appellees, of a non-freeholder and father of six school children who was barred from selection to the

school board expressly in order to resolve the constitutionality of the freeholder requirement (A. 370-71; 72, 73).

The remaining appellees argue that property owners have the capacity to deal with the duties of school board office which non-property owners do not possess:

“a person having such fiscal responsibilities should have the qualification of having acquired some property himself.” (Brief p. 11)

This argument simply does not stand examination in light of the facts of contemporary life, for “some property” need not mean real property. Men and women exercise considerable fiscal responsibilities, both in public and private life, without ownership of real property. Similar to the non-property owners disfranchised in *Cipriano* and *Kramer*, non-property owners in Georgia feel the impact of the operation of the public schools and are entitled to a voice in their operation, regardless of whether they are real property owners. Moreover, the state’s Brief exposes the fact that the freeholder qualification does not even serve the limited purpose the remaining appellees seek to employ as its justification:

... it would still seem that an individual who was a serious aspirant for the office of county school board member would be able to obtain a conveyance of the single square inch of land he would require to become a “freeholder.” (Brief p. 26)

The notion the freeholder requirement should be upheld because one could become a freeholder by acquiring a “single square inch” of land demonstrates that the requirement need not serve the purpose of ensuring qualified public school board members which remaining appellees claim for it. Rather it prohibits those non-property owners

who do not wish to submit to such chicanery from being selected as school board members. As the freeholder requirement plainly discriminates against the poor without satisfying a compelling state interest, it violates the Equal Protection Clause of the Fourteenth Amendment.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 23.—OCTOBER TERM, 1969

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| Calvin Turner et al., Appellants, v. W. W. Fouche et al. | } | On appeal from the United States District Court for the Southern District of Georgia. |
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[January 19, 1970]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case, a companion to *Carter v. Jury Comm'n of Greene County*, ante, p. —, involves a challenge to the constitutionality of the system used in many counties of Georgia to select juries and school boards. The basic statutory scheme at issue is this. The county board of education consists of five freeholders.¹ It is selected by the grand jury,² which in turn is drawn from a jury list selected by the six-member county jury commission.³ The commissioners are appointed by the judge of the state superior court for the circuit in which the county is located.⁴

¹ Ga. Const., Art. VIII, § V, ¶ I, Ga. Code Ann. § 2-6801 (1948). At the oral argument we were advised that under Georgia law a "freeholder" is any person who owns real estate.

² Ga. Const., Art. VIII, § V, ¶ I, Ga. Code Ann. § 2-6801 (1948). See also Ga. Code Ann. § 32-902 (1969).

³ Ga. Code Ann. §§ 59-101, 106 (1965 and Supp. 1968).

⁴ Ga. Code Ann. § 59-101 (1965). Prior to 1966 the superior court judges were elected by all the voters in the State, but now they are elected by the voters of the circuits over which they have jurisdiction. See Ga. Const., Art. VI, § III, ¶ II, Ga. Code Ann. § 2-3802 (Supp. 1968); *Stokes v. Fortson*, 234 F. Supp. 575.

Some 2,500 to 3,000 people live in Taliaferro County, Georgia, of whom about 60% are Negroes.⁵ The county school system consists of a grammar school and a high school, and all the students at both schools are Negroes, every white pupil having transferred elsewhere.⁶ Sandra and Calvin Turner, a Negro school child and her father who reside in that county, brought this class action against the members of the county board of education, the jury commissioners, and three named white grand jurors.⁷ Their complaint alleged that the board of education consisted entirely of white people; that it had

⁵ In its brief Georgia informs us that its Department of Public Health estimates that Taliaferro County now has about 1,500 Negro and 1,000 white citizens. According to the 1960 federal census, the county had a population of 3,370, of whom 2,096 were Negroes and 1,273 white people. U. S. Dept. of Commerce, Bureau of the Census, 1960 Census of Population, Vol. I, pt. 12, p. 12-83.

⁶ This state of affairs has arisen following litigation attacking the county's former dual school system. Prior to the fall of 1965 Taliaferro County had used one school building for Negroes and the other for whites. In that year, after 87 Negro pupils sought transfers to a desegregated school, the superintendent, knowing the white school would be closed, arranged for the transfer of the white pupils, at public expense, to public schools in adjoining counties. A three-judge District Court declared the arrangement illegal, placed the Taliaferro County school system in receivership under the State's superintendent of schools, and instructed him to prepare a plan that would allow those Negroes who wanted to transfer to a desegregated school the opportunity to do so. *Turner v. Goolsby*, 255 F. Supp. 724. It is undisputed that some white pupils now attend a private institution in the county. In addition, the appellants suggest that white children continue to attend public schools in neighboring counties. Efforts to combine districts to avoid an all-Negro school system in Taliaferro County have proved unsuccessful.

⁷ The District Court struck the grand jurors as parties defendant for failure of the appellants to state as against them a claim upon which relief could be granted. The appellants did not appeal from that portion of the judgment below, and the motion of the appellee grand jurors to dismiss the appeal as to them is granted.

been selected by a predominantly white grand jury, which in turn had been selected by the jury commissioners, all of whom were white people. The complaint charged that the board of education had deprived the Negro school children of textbooks, facilities, and other advantages; also that the Turners and other Negro citizens had sought unsuccessfully to communicate their dissatisfaction to the board of education.

According to the appellants, the members of the county grand jury, on which white people were perennially overrepresented and Negroes underrepresented, chose only white people as members of the board of education pursuant to the Georgia constitutional and statutory provisions governing the school-board selection. The complaint attacked those provisions as accounting for both the exclusion of Negroes and nonfreeholders from the board of education, and for the merely token inclusion of Negroes on the grand juries. The appellants sought (1) an injunction prohibiting enforcement of the Georgia constitutional and statutory provisions by which the board of education and grand jury were selected; (2) a declaration that the provisions were void on their face and as applied; (3) a further declaration that the various positions on the board of education, grand jury, and jury commission were vacant; (4) the appointment of a receiver for the school system and a special master for the selection of the grand jurors; and (5) \$500,000 in ancillary damages.

A three-judge District Court was convened pursuant to 28 U. S. C. §§ 2281 and 2284, and conducted extensive evidentiary hearings. The evidence showed that whenever a jury commissioner thought a voter from his area of the county qualified as a potentially good juror, he offered the name for consideration to his fellow commissioners; if all agreed, the name went on the master

jury list. No name of a county resident was placed on the list unless he was personally known to at least one of the jury commissioners. The commissioners looked for "people that we felt would be capable of interpreting proceedings of court and . . . render[ing] a just verdict" The state superior court judge had instructed them to put Negroes on the list. Following the compilation of the list, the commissioners "picked the ones we thought were the very best people in the county" and put them on the grand-jury list. The superior court judge then drew the names of the grand jurors at random in open court. Only he could excuse from grand-jury service those whose names he drew; and he denied that Negroes were ever excused out of turn, or on account of their race.

At its first hearing, held in January 1968, the District Court voiced its concern that only 11 Negroes had found their way to the 130-member grand-jury list. The court adjourned for one month to enable the defendants to remedy the situation. It noted that two vacancies had opened up on the board of education and that, although the board had held an interim election, the grand jury had not yet confirmed the new members. The court suggested that "[i]f those two men would willingly stand aside the other members might select two outstanding Negro citizens . . . to go on the Board." The court also advised counsel for the defendants to explain the law of jury discrimination to his clients, and expressed the hope that the jury commissioners would be "generous" in their recomposition of the panel.

At the adjourned hearing in February, it appeared that three days after the first hearing the state superior court judge had discharged the county grand jury and directed the jury commissioners to recompose the jury list. Work-

ing from the voter registration list at the last general election,⁸ the commissioners had prepared a new grand-jury list containing the names of 44 Negroes and 77 white people. From this list the superior court judge drew the names that led to the impaneling of a new grand jury of 23 members, of whom only six were Negroes. Meanwhile the board of education had elected a Negro and a white man to fill the two vacancies, and the new grand jury had confirmed the new members in their offices.

Following these developments, the District Court declined to invalidate on their face either the various provisions governing the school-board and grand-jury selections, or the freeholder requirement for school-board membership. It found that at the commencement of suit Negroes had been systematically excluded from the grand juries through token inclusion, but it concluded that the new grand-jury list, drawn following the January hearing, was not unconstitutional. *Turner v. Fouche*, 290 F. Supp. 648.⁹

Subsequently the District Court entered a final judgment permanently enjoining the defendant jury commissioners and their successors from systematically excluding Negroes from the Taliaferro County grand-jury system. The appellants, complaining of the court's failure to hold the challenged provisions of Georgia law invalid on their face and as applied, took a direct appeal

⁸ Georgia has used the voter registration lists rather than the books of the tax receiver since our decision in *Whitner v. Georgia*, 385 U. S. 545.

⁹ The District Court found that the appellants' claim that the board of education had deprived the Negro school children of textbooks, facilities, and other advantages failed for want of proof. The court also declined to reach the appellants' claim for ancillary damages, leaving this question to single-judge inquiry. No issue concerning these rulings is presented on the appeal.

to this Court pursuant to 28 U. S. C. § 1253, and we noted probable jurisdiction, 393 U. S. 1078.¹⁰

I

The appellants urge that the constitutional and statutory scheme by which the Taliaferro County grand jury selects the board of education is unconstitutional on its face. They point to the discretion of the state superior

¹⁰ We reject the appellees' suggestion that we lack jurisdiction to entertain an appeal from the District Court on the theory that a court of three judges was not required under 28 U. S. C. § 2281 because the appellants sought to enjoin only the acts of county officials. The jury commissioners and members of the board of education were "functioning pursuant to a statewide policy and performing a state function," *Moody v. Flowers*, 387 U. S. 97, 102; cf. *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 92-95; and see *Dusch v. Davis*, 387 U. S. 112, 114; *Sailors v. Bd. of Educ.*, 387 U. S. 105, 107. The appellants cannot be denied a three-judge court below and direct review here simply because Georgia chooses to denominate as "local" or "county" the officials to whom it has entrusted the administration of the challenged constitutional and statutory provisions. *Rorick v. Bd. of Comm'rs*, 307 U. S. 208, 212; cf. *City of Cleveland v. United States*, 323 U. S. 329, 332.

Under Georgia law Taliaferro County may replace the constitutional and statutory arrangement by which the grand jury elects the board of education with the direct election of the board by the qualified voters of the county upon the enactment of a local or special law by the legislature and its approval in a referendum by a majority of the qualified voters. Ga. Const., Art. VIII, § V, ¶ 2, Ga. Code Ann. § 2-6802 (Supp. 1968). But Georgia does not suggest that so many counties have taken advantage of this provision that the present selection of the board by the grand jury in effect amounts to a local option.

The appellees also propose a distinction between attacks on statutes and attacks upon the results of their administration, and urge that the appellants' case comes within the latter category. But this argument overlooks the line, delineated by our past decisions, that falls between a petition for injunction on the ground of the unconstitutionality of a *statute*, either on its face or as applied,

court judge to exclude anyone he deems not "discreet" from appointment to the jury commission,¹¹ and of the jury commissioners to eliminate from grand-jury service anyone they find not "upright" and "intelligent."¹² These provisions, the appellants say, provide the county officials an opportunity to discriminate exercised both before and after the commencement of this litigation. It is argued that the terms are so vague as to leave the judge and jury commissioners at large in the exercise of discretion, with their decisions "unguided by

which requires a three-judge court, and a petition seeking an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute not attacked as unconstitutional. *Louisiana v. United States*, 380 U. S. 145, 150 and n. 9; *Query v. United States*, 316 U. S. 486, 489; *Ex parte Bransford*, 310 U. S. 354, 361; *Stratton v. St. Louis S. W. Ry.*, 282 U. S. 10, 15; *Ex parte Hobbs*, 280 U. S. 168, 172.

Similarly, we reject the appellees' contention, ancillary to their basic attack on our jurisdiction, that the three-judge court was improperly convened because of the insubstantiality of the appellants' challenge to the Georgia laws. *Swift & Co. v. Wickham*, 382 U. S. 111, 115; *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U. S. 713, 715 (*per curiam*); *California Water Service Co. v. City of Redding*, 304 U. S. 252, 255 (*per curiam*); *Ex parte Poresky*, 290 U. S. 30, 32 (*per curiam*). Further, the District Court properly entertained the question whether the constitutional and statutory complex, even if not invalid on its face, was unconstitutionally administered. Without regard to whether that issue was one by itself warranting a three-judge court, see *Ex parte Bransford*, *supra*; Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 37-50, it related to the appellants' claim that Georgia's school-board selection procedure was unlawful on its face. *Flast v. Cohen*, 392 U. S. 83, 90-91; *Zemel v. Rusk*, 381 U. S. 1, 5-6; *United States v. Georgia Pub. Serv. Comm'n*, 371 U. S. 285, 287-288; *Paul v. United States*, 371 U. S. 245, 249-250; *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U. S. 73, 75-85; *Louisville & N. R. R. v. Garrett*, 231 U. S. 298, 303-304.

¹¹ Ga. Code Ann. § 59-101 (1965).

¹² Ga. Code Ann. § 59-106 (Supp. 1968).

statutory or other guidelines." Only by excising the challenged terms from Georgia's laws, it is urged, can the jury discrimination revealed in the record of this case be eliminated.

Such arguments are similar to those advanced in *Carter v. Jury Comm'n of Greene County*, ante, p. —. Our decision in that case fairly controls disposition of the contentions here. Georgia's constitutional and statutory scheme for selecting its grand juries and boards of education is not inherently unfair, or necessarily incapable of administration without regard to race; the federal courts are not powerless to remedy unconstitutional departures from Georgia law by declaratory and injunctive relief. The challenged provisions do not refer to race; indeed, they impose on the jury commissioners the affirmative duty to supplement the jury lists by going out into the county and personally acquainting themselves with other citizens of the county whenever the jury lists in existence do not fairly represent a cross-section of the county's upright and intelligent citizens.¹³

¹³ Ga. Code Ann. § 59-106 (Supp. 1968).

Our decisions in *Avery v. Georgia*, 345 U. S. 559, and *Whitus v. Georgia*, 385 U. S. 545, cannot aid the appellants. In *Avery* we reversed a judgment of conviction where the names of prospective petit jurors had been printed on differently colored tickets according to their race—white tickets for white people, and yellow tickets for Negroes. A state superior court judge drew the names from the jury box and handed them to the sheriff, who entrusted them to the court clerk for arranging the tickets and typing up the list of persons to be called to serve on the panel. We found that the use of the white and yellow tickets made it easier "for those to discriminate who are of a mind to discriminate," and that even if the judge had drawn the names without looking to see the color of the tickets, "opportunity was available to resort to [discrimination] at other stages in the selection process." 345 U. S., at 562.

Whitus involved a refinement of the process we had condemned in *Avery*. In *Whitus* the jury commissioners made up the jury list from which both traverse and grand jurors were selected by reference to the tax digest, which was segregated into sections—one with white

But the appellants contend that even if the challenged provisions are not void on their face, they have been unconstitutionally applied. The District Court found that prior to the commencement of suit Negroes had been excluded in the administration of the grand-jury system, and the appellees do not contest that finding here.¹⁴ The District Court also concluded that the newly composed grand-jury list was constitutional, and the appellants challenge that ruling. Consideration of the issues thus presented requires a fuller statement of the events following the January hearing in the court below.

As noted above, after the District Court had held its first hearing, the state superior court judge discharged

sheets for white people and the other with yellow sheets for Negroes—and to an old jury list required by former law to be made up from the tax digest. We concluded that “[u]nder such a system the opportunity for discrimination was present,” and on the record before us we could not say that that opportunity “was not resorted to by the commissioners.” 385 U. S., at 552.

In both *Avery* and *Whitus* we noted without comment the “up-right and intelligent” requirement for jury membership. 385 U. S., at 552; 345 U. S., at 562. In *Avery* we expressly commented that Georgia law did not authorize the use of the potentially discriminatory process under review. 345 U. S., at 562. In both cases we struck down the white-and-yellow system, however varied in design, because of the obvious danger of abuse. See *Williams v. Georgia*, 343 U. S. 375, 382. We dealt in both cases with a physical, even mechanical aspect of the jury-selection process that could have no conceivable purpose or effect other than to enable those so disposed to discriminate against Negroes solely on the basis of their race. It is evident that the challenged provisions now before us contain no such defect. The appellants cannot contend that the present requirements serve no rational function other than to afford an opportunity to state officials to discriminate against Negroes if they desire to do so.

¹⁴ Indeed, at the oral argument before this Court, counsel candidly conceded: “There is no question but that Georgia’s jury selection statute is capable of being improperly administered. There is no question but that in Taliaferro County, Georgia, it has been misadministered.”

the grand jury then sitting and ordered the jury commissioners to draw up a new jury list. The commissioners obtained the list of all persons registered to vote in the county in the last general election—some 2,152 names. To assist in the identification of all the people on the list, the commissioners consulted with “three Negroes that [they] brought in to work with [them] one afternoon” From the list the commissioners eliminated 374 people for poor health and old age; 79 as under 21 years old;¹⁵ 93 as dead; 514 as away from the county most of the time but maintaining a permanent place of residence there; 48 who requested that they be removed from consideration; 225 about whom the commissioners could obtain no information; 33 as duplicated names; and 178 “as not conforming to the statutory qualifications for juries either because of their being unintelligent or because of their not being upright citizens.”

The process of elimination left 608 names. The commissioners arranged the names in alphabetical order and placed every other one on the list of potential jurors. At this point, for the first time, the commissioners classified the remaining 304 people by race: 113 were Negro, 191 white people. From this list the commissioners drew two-fifths of the names by lot for the grand-jury list; a check revealed 44 Negroes and 77 white people. The state superior court judge drew from this group nine Negroes and 23 white people by lot. He excused nine, leaving a 23-member grand jury of whom only six were Negroes.¹⁶ It was this grand jury that the District Court determined had been constitutionally impaneled.

¹⁵ Although Georgia grants the franchise to its citizens at 18, Ga. Const., Art. II, § I, ¶ II, Ga. Code Ann. § 2-702 (1948), the jury commissioners struck all persons under 21.

¹⁶ At the adjourned hearing the superior court judge testified that he regularly excuses people from the traverse-jury lists as well as the grand-jury panel he draws in the courtroom. Whether the request

After the February hearing of the District Court, and at that court's request, the commissioners classified by race the persons eliminated from the voter list in arriving at the 608 persons eligible for jury service. The classification revealed that 171 of those rejected as unintelligent or not upright were Negroes—96% of the total removed for that reason.¹⁷ Although at the adjourned hearing the District Court recognized the potential for discrimination underlying the exclusion process, it did not reopen the matter following its receipt of the racial classification to consider the extraordinarily high percentage of Negroes eliminated as "unintelligent" or not "upright," or the large number of persons about whom the commissioners said they could obtain no information even though they were registered to vote in the county.

The appellants insist the District Court has erred. They say that since the grand jury selects the board of education, the situation must be viewed as one involving a distribution of voting power among the citizens of Taliaferro County in the manner of a voting apportionment case. A grand jury with only about 25% Negro membership, they say, constitutes the school-board "electorate" in a county whose population is about 60% Negro. The State must offer a compelling justification, it is argued, in support of its "fencing out" such a substantial proportion of the potential Negro "electors" in the county.

We do not find it necessary to consider the appellants' argument. Nor do we reach the premise upon which it

to be excused was made in open court, in writing, or over the telephone, only the judge could excuse from grand-jury service those whose names he had drawn.

¹⁷ It also appeared that 191 of those stricken for poor health and old age were Negro (51%); 71 of those under 21 (90%); 263 of those away from the county (51%); and three who asked to be relieved from jury duty (6%).

rests—that the choice of the county board of education by the grand jury rather than delegates from local school boards turns the challenged procedure into an “election” for federal constitutional purposes.¹⁸ For we think that even under long-established tests for racial discrimination in the composition of juries, the District Court erred in its determination that the new list before it had been properly compiled.

The undisputed fact was that Negroes comprised only 37% of the Taliaferro County citizens on the 304-member list from which the new grand jury was drawn. That figure contrasts sharply with the 60% of the representation that their percentage of the general Taliaferro County population would have led them to obtain in a random selection. In the absence of a countervailing explanation by the appellees, we cannot say that the underrepresentation reflected in these figures is so insubstantial as to warrant no corrective action by a federal court charged with the responsibility of enforcing constitutional guarantees.

Specifically, we hold that the District Court should have responded to the elimination of 171 Negroes out of the 178 citizens disqualified for lack of “intelligence” or “uprightness.” On the record as presently constituted, it is impossible to say that this purge of Negroes from the roster of potential jurors did not contribute in substantial measure to the ultimate underrepresentation. The retention of these 178 citizens might well have produced a jury list of at least an equal percentage of Negroes and white people, instead of the highly disproportionate list that actually materialized.

A second factor should have called itself to the District Court’s attention: the lack of information respecting the 225 citizens named on the county’s voting list but unknown to the jury commissioners or their assistants. Entirely apart from the question whether the commis-

¹⁸ See *Sailors v. Bd. of Educ.*, 387 U. S. 105, 106.

sioners' failure to inquire into the eligibility of the 225 voters comported with their statutory duty to ensure that the jury list fairly represent a cross-section of the county's intelligent and upright citizens,¹⁹ the court should not have passed without response the commissioners' elimination from consideration for jury service of about 9% of the population of the entire county. In the face of the commissioners' unfamiliarity with Negroes in the community and the informality of the arrangement by which they sought to remedy the deficiency in their knowledge upon recompiling the jury list, we cannot assume that inquiry would not have led to the discovery of many qualified Negroes.

In sum, the appellants demonstrated a substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list. They further demonstrated that the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. The appellants thereby made out a *prima facie* case of jury discrimination, and the burden fell on the appellees to overcome it.²⁰

The testimony of the jury commissioners and the superior court judge that they included or excluded no one because of race did not suffice to overcome the appellants' *prima facie* case.²¹ So far the appellees have

¹⁹ Ga. Code Ann. § 59-106 (Supp. 1968).

²⁰ See *Jones v. Georgia*, 389 U. S. 24, 25 (*per curiam*); *Coleman v. Alabama*, 389 U. S. 22, 23 (*per curiam*); *Avery v. Georgia*, 345 U. S. 559, 562-563; *Patton v. Mississippi*, 332 U. S. 463, 468-469; *Hill v. Texas*, 316 U. S. 400, 405-406; *Norris v. Alabama*, 294 U. S. 587, 594-596, 598.

²¹ *Sims v. Georgia*, 389 U. S. 404, 407; *Whitus v. Georgia*, 385 U. S. 545, 551; *Eubanks v. Louisiana*, 356 U. S. 584, 587; *Hernandez v. Texas*, 347 U. S. 475, 481-482; *Avery v. Georgia*, *supra*, at 561; *Norris v. Alabama*, *supra*, at 598; cf. *Brown v. Allen*, 344 U. S. 443, 481.

offered no explanation for the overwhelming percentage of Negroes disqualified as not "upright" or "intelligent," nor for the failure to determine the eligibility of a substantial segment of the county's already registered voters. No explanation for this state of affairs appears in the record. The evidentiary void deprives the District Court's holding of support in the record as presently constituted. "If there is a 'vacuum' it is one which the State must fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination."²²

II

The appellants also urge that the limitation of school-board membership to freeholders violates the Equal Protection Clause of the Fourteenth Amendment.²³ The District Court rejected this claim, finding no evidence before it "to indicate that such a qualification resulted in an invidious discrimination against any particular segment of the community, based on race or otherwise."

²² *Avery v. Georgia*, *supra*, at 562; cf. *Pierre v. Louisiana*, 306 U. S. 354, 361-362; *Norris v. Alabama*, *supra*, at 594-595, 598-599.

We reserve the question whether a State that for years has provided separate and inferior schools for Negroes may now disqualify them from jury service on the "impartial" ground of educational inadequacy, however defined. See *Gaston County v. United States*, 395 U. S. 285, 297.

²³ Georgia's contention that no appellant has standing to raise this claim is without merit. The appellant Calvin Turner is a freeholder, but the appellant Joseph Heath is not. Heath's motion to intervene was granted by the District Court for the express purpose of adding a party plaintiff to the case to ensure that the court could reach the merits of this issue. Georgia also argues that the question is not properly before us because the record is devoid of evidence that the freeholder requirement actually has operated to exclude anyone from the Taliaferro County board of education. But the appellant Heath's allegation that he is not a freeholder is uncontested, and Georgia can hardly urge that her county officials may be depended on to ignore a provision of state law.

Subsequent to the ruling of the District Court, this Court decided *Kramer v. Union Free School District*, 395 U. S. 621, and *Cipriano v. City of Houma*, 395 U. S. 701. The appellants urge that those decisions require Georgia to demonstrate a "compelling" interest in support of its freeholder requirement for school-board membership. The appellees reply that *Kramer* and *Cipriano* are inapposite because they involved exclusions from voting, not from office-holding. We find it unnecessary to resolve the dispute, because the Georgia freeholder requirement must fall even when measured by the traditional test for a denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective.²⁴

We may assume that the appellants have no right to be appointed to the Taliaferro County board of education.²⁵ But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications.²⁶ The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.²⁷

Georgia concedes that "the desirability and wisdom of 'freeholder' requirements for State or county political office may indeed be open to question" But apart from its contention that prior decisions of this Court foreclose any challenge to the constitutionality

²⁴ *McGowan v. Maryland*, 366 U. S. 420, 425-426; *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U. S. 552, 556.

²⁵ Cf. *Snowden v. Hughes*, 321 U. S. 1, 7.

²⁶ Cf. *Anderson v. Martin*, 375 U. S. 399, 402, 404; *Snowden v. Hughes*, *supra*, at 7-8.

²⁷ Cf. *Carrington v. Rush*, 380 U. S. 89, 91; *Lassiter v. Northampton County Bd. of Elections*, 360 U. S. 45, 50-51; *Pope v. Williams*, 193 U. S. 621, 632.

of such "freeholder" requirements—a contention we think ill-founded²⁸—the sole argument Georgia advances in support of its statute is that nothing in its constitution or laws specifies any minimum quantity or value for the real property the freeholder must own. Thus, says Georgia, anyone who seriously aspires to county school-board membership "would be able to obtain a conveyance of the single square inch of land he would require to become a 'freeholder.'"

If we take Georgia at its word, it is difficult to conceive of any rational state interest underlying its requirement. But even absent Georgia's own indication of the insubstantiality of its interest in preserving the freeholder requirement, it seems impossible to discern any interest the qualification can serve. It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools, a lessee who effectively pays the property taxes of his lessor as part of his rent, or a state and federal taxpayer contributing to the approximately 85% of the Taliaferro County annual school budget derived from sources other than the board of education's own levy on real property.

²⁸ Language to such effect may be found in *Strauder v. West Virginia*, 100 U. S. 303, 310. But the passage relied upon by Georgia is no more than dictum. Later decisions invoking *Strauder* fall in the same category. *Gibson v. Mississippi*, 162 U. S. 565, 580; *Neal v. Delaware*, 103 U. S. 370, 386. *Vought v. Wisconsin*, 217 U. S. 590, is hardly apposite; there we dismissed an appeal for want of a meritorious question in a case where the appellant challenged a judgment of conviction arising from an indictment returned by a grand jury selected by commissioners required by statute to be freeholders.

Nor does the lack of ownership of realty establish a lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold.²⁹ Whatever objectives Georgia seeks to obtain by its "freeholder" requirement must be secured, in this instance at least, by means more finely tailored to achieve the desired goal.³⁰ Without excluding the possibility that other circumstances might present themselves in which a property qualification for office-holding could survive constitutional scrutiny, we cannot say, on the record before us, that the present freeholder requirement for membership on the county board of education amounts to anything more than invidious discrimination.

The judgment below is vacated, and the cause is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

²⁹ Cf. *Leary v. United States*, 395 U. S. 6, 32-36; *Tot v. United States*, 319 U. S. 463, 468.

³⁰ Cf. *Carrington v. Rash*, *supra*, at 95-96.